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CURRENT EVENTS.

THE OBLIGATION OF CONTRACTS. — In October last Mr. Aldace F. Walker, President of the Vermont Bar Association, delivered before that body an address upon the Dartmouth College Case,[1] and subsequent adjudications on the same clause of the Constitution. That address, re-printed in a pamphlet bearing the rather fantastic title, "A Legal Mummy," is now before us. Toward the close of his address he says of this celebrated case: "In fact this historic cause has been embalmed in spices, and laid carefully away upon a shelf, like the corpse of an Egyptian king." It may, however, be questioned whether the rulings of that case are so very dead, as Mr. Walker supposes, but it is certainly true that the constitutional provision has been shorn by judicial construction of very much of its efficiency. The provision is short, and apparently very simple. "No State shall pass any law impairing the Obligation of Contracts." No ten words in the language have occasioned so much controversy. If the matter were *res integra* there would seem to be no difficulty. There are but two questions latent in the provision. What is a contract, and what is its obligation? The answer to the first would be, that a contract is an agreement of two or more competent persons, for a consideration, reciprocally, to do, or abstain from doing, stipulated things. The obligation of a contract is the duty of the parties to it, to perform or fulfil it according to its terms. In the first case involving this clause of the Constitution, in 1810, the Supreme Court held, in effect, that the clause in question meant precisely what it said, and included all contracts, executed and executory.[2] In 1819, in the Dartmouth College Case,[3] the *fons et origo* of the subsequent stream of adjudications, the court made two concessions; that the Constitution only protected property or money contracts, and did not restrain the States in the regulation of their civil institutions. This latter concession was as the "letting out of water;" under it all manner of licenses, State and municipal, and the vast, indefinite, indefinable "Police Power" of the States were emancipated from the operation of the constitutional restriction. Mr. Justice Bradley said: "Legislative discretion as to the exercise of the police power can no more be bargained away than the power itself."[4] Mr. Walker enumerates in detail the successive adjudications by which this great, general, pervasive, and beneficent constitutional provision has been shorn of its power and restricted in its operation. Upon its face, and in its terms, it included all contracts, but the Supreme Court has decided that it does not include implied contracts, or contracts which do not "respect property or some object of value, and confer rights which may be asserted in a court of justice." It must succumb to the Police Power of the States, and affords no protection against demands made in the name of Eminent Domain. We have not the space to follow Mr. Walker through his long list of adjudications, each of which clips off something from the efficacy of the provision, and but for three recent cases in which its vitality is asserted,[5] we would be ready to believe, with Mr. Walker, that the constitutional provision, and the "great historic cause" in which it is expounded, are as dead as Ptolemy Philadelphus. All these modifications of our organic law have, no doubt, been rendered necessary or expedient by the changes wrought by time and progress, but we are of the opinion that they are of too radical a nature to have been appropriately accomplished by judicial construction, but should have been effected by constitutional amendment. We fully recognize the fact that the wisdom of one generation may well become utter folly in the next—that all human institutions should be made to conform to the progressive spirit of the age—we only insist that all changes should be made in the proper man-

[1] Trustees of Dartmouth College v. Woodward, 4 Wheat. 518.

[2] Fletcher v. Peck, 6 Cranch. 87.

[3] *Supra.*

[4] Boston Beer Company v. Massachusetts, 97 U.S. 25.

[5] New Orleans etc. Co v. Louisiana etc. Co., 115 U. S. 650; New Orleans Water Works v. Rivers, 115 U. S. 674; Louisville Gas Co. v. Citizens Gas Co. 115 U. S. 683.

ner and by the prescribed authority. With this proviso, we fully concur with Sydney Smith, who said, doubtless in view of the omnipotence of Parliament: "Whenever a man talks to me about an unalterable law, the only impression he makes upon me is that he is an unalterable fool."

FEES AND PRACTICE.—The following excellent article was written by Mr. Donovan, at the request, made through this office, by one of our subscribers, a Minnesota lawyer, who desired to know how one should fix his fees and yet retain his clients. ED. C. L. J.

A learned and able advocate, lately sent on a foreign mission after a fine career in practice, in which he acquired a fortune, once told me that he began by low fees and guaged his charges in proportion to the ability of the client to pay and the benefit derived from his services. His method of stating his bill was quite taking. To the question of "How much will that be?" he would say; "It will depend very much on the work required, say $50 a day, with one day in advance for looking up the facts before trial." "I will give you a receipt for a part of it now if convenient." Thus he decided for the halting client and settled the whole matter; striking while the iron was hot and pleasing his customer. Ten dollars for justice cases, and $30 per day for the Circuit and $50 for Supreme Court, with extra for outside cases, were his first fees in a city practice—a fair rate for young lawyers.

In fixing counsel fees he was equally skillfull. "We'll make it $10—if that will be about right!" or "You may write me a check for a hundred," or "You may leave me $5, if you have it handy," in such a mild form his money would be cheerfully paid over and he never failed to treat the subject with delicate courtesy—leaving room to revise his charges if required by a stubborn client, but generally saying to such, "O, yes, certainly, you can hire such lawyers, but I am too busy at present to take very low priced practice." This is an instance of a wise man's course. Law practice opens many doors of paying bnsiness outside of court rooms—he took advantage of them and bought and sold property. "I have never realized," said Judge Shipman, "what a help it is to have a good counsel in matters of deeds and settlement of business matters until yesterday. Such men are valuable partners in a firm's business. I have just settled an estate or found it all settled by a joint deed which left a fine property to the wife without any court proceedings—simply by looking ahead in season."

These two men have grown eminent and well-off by kind, fair, and ingenious treatment of clients—many others drive away custom by overcharging and carelessness. If the example of the first named is a lesson, it is certainly a wise one. But every one must use his own weapons. One may be small, like Spurgeon—then let him be as earnest and he will approach this wonderful speaker. Another may be plain and practical, with few gifts of oratory or eloquence—such men are more useful as judges or corporation counsel. Still another may be poor and just struggling for a foot-hold—let him use the ladder of integrity, for it will soon bear him higher, while the quality of his work, the extent of his acquaintance, must influence his business. It may be he can form in the procession by joining a firm and watching for an opening. If ingenious and determined that will help him. Let him make an honest measure of his ability and go forward on the right road in confidence.

Practice is always precarious, for a few years at least, and never afterwards if one is prepared for it. It is the beginning that counts in law, letters, or farming. As a tree grows larger from all branches, so law business increases by the good name given you by your clients. Live and labor for a good name and you will find it a fee, a retainer, and a fortune. Don't give up too easily. In your section—in the great Northwest, are firms forming contracts to make, wills to draw, men to defend, money to handle. Mingle with the world with frankness—the friendly will have friends everywhere—and success depends on how many you can grapple to you with hooks of steel. Every man that gives you a good name is a client.

J. W. DONOVAN.

CONSTRUCTION OF A "CELEBRATED FABLE."—We said some time ago, apropos, of the *Albany Law Journal's* suggested heroic treatment of the maladies of the Federal judiciary:

"We are not so much addicted to iconoclasm as our contemporary, and hesitate to assail *a l'outrance*, and without appropriate preliminaries, so venerable and venerated an idol as the life tenure of Federal judicial office. Milder measures are first in order, and contrary to the philosophy of the spelling-book fable, we would use tufts of grass first to dislodge the naughty boy from the apple-tree, before 'trying what virtue there is in stones.'"

Upon this our contempory remarks:

"But what an iconoclast our brother is, who thus misrepresents the celebrated fable in Webster's spelling-book. For 'contrary' read 'according.'"

Doctors will differ, judges sometimes dissent, and even editors cannot always agree. Under deep submission we adhere to our construction of the *philosophy* of the "celebrated fable." The husbandman used tufts of grass—in vain, but upon trying what virtue there was in stones, the naughty boy quickly came down from the tree and hnmbly "begged the old man's pardon." The philosophy of the story is, that milder measures will fail, but pebbles from the brook will, as we learn from an ancient precedent, prove very efficient.

Hence, our kind-hearted leaning to milder methods was *contrary*, not *according*, to the philosophy;—the lesson taught by the celebrated fable.—Q. E. D.

NOTES OF RECENT DECISIONS.

CONTRACT—IMPLIED PROMISE—QUANTUM—MERUIT—EVIDENCE.—The Supreme Court of Vermont recently decided a case[1] which is chiefly remarkable for what it does *not* decide. The facts were that the plaintiff began to work for defendant in his livery stable without any contract more definite than that defendant assured him that "it would be all right." While so engaged he received an offer of employment, upon what terms does not appear, from Morgan, and defendant told him that he, defendant, would do as well for him as Morgan would. Afterwards, the parties signed a written agreement by which it was stipulated that plaintiff's remuneration should be his board and clothes. Nevertheless, he brought suit for his wages as upon an implied contract or a *quantum meruit*, proved by Ridge, a livery stable "help," what his services were in his (Ridge's) opinion, worth, and recovered judgment therefor. And this judgment the appellate court affirmed.

It does not appear that defendant failed to perform his part of the board and clothes contract, and we cannot understand how, in the absence of averment and proof of a breach of that contract, any judgment at all could have been rendered in favor of the plaintiff. The evidence showed that his health was poor, and the written contract showed that both parties regarded a mere subsistence as full compensation for such services as he could render. The opinion of the court ignores the written contract altogether except in an immaterial point of construction, decides that Ridge's opinion as to value of plaintiff's services was competent evidence, and that no presumption against the validity of a creditor's claim arises from his failure to dun, unless he is not only poor, but in need of ready money for present use.

The case is very remarkable because the opinion of the appellate court utterly ignores the only substantial question between the parties, and the judgment of the trial court is affirmed upon issues manifestly immaterial.

It is well settled law that, when one agrees to serve gratuitously, no promise to pay any compensation will be implied.[2] And if by written contract, compensation for services is made contingent upon the happening of a particular event, if the event does not happen, the compensation is lost and the written contract cannot be varied by parol evidence.[3] In an old Massachusetts case, Parsons, C. J., said: "As the law will not imply a promise where there was an express promise, so the law will not imply a promise of anyone against

[1] Stone v. Tupper, 6 East. Rep. 465.

[2] Woods Mast. and Servt. § 66; Bartholomew v. Jackson, 20 Johns. 28.

[3] Zerrahn v. Ditson, 117 Mass. 583.

his own express declaration."[4] It is very true that when one party renders services of which the other avails himself, the law will imply a contract to pay for them what they are reasonably worth.[5] But if the suit is brought upon a *quantum meruit*, and it appears that the subject matter was covered by an express contract, the recovery will be limited by the amount specified by such express contract.[6] The gradations are well settled; an implied contract is always overruled by an express parol contract; that by a written contract, and that by a specialty.

NEGLIGENCE—MASTER AND SERVANT—FELLOW-SERVANT — PERILOUS EMPLOYMENT. — There seems to be no limit to the infinite variety of combinations of which the subject of negligence is capable. The Supreme Court of Minnesota recently decided a case,[7] in which it appeared that plaintiff's intestate was engaged in handling disabled cars on the "repair track" in the yard; that on that track all cars are in "bad order," and are only moved to and fro as occasion may require for the purposes af repair. Plaintiff's intestate was killed in attempting to mount one of the "bad order" cars which was in motion, but it did not appear why he attempted to mount it at all.

The court held that as the employment of handling these bad order cars was essentially and avowedly perilous, the deceased must be presumed, in entering upon it, to have assumed all the risks growing out of the bad order and imperfections of the cars. It says:

"The subject of the case is, then, this: The plaintiff's intestate is notified, generally, that the car is in bad order, so that it has been necessary to withdraw it from ordinary service and lay it up for repairs. When he comes to handle it, he does so knowing that, for some reasons, not disclosed to him, it is not suitable for use in the ordinary way. Not knowing what, in particular, those reasons are, if he handles the car at all, he handles it as a car unsuitable for use, and at his own risk, not only for its defects,—at least, for such as are apparent to or would fairly be suggested by ordinarily diligent and careful observation, like those of the brake on this car,—but also at the risk of the negligence of his fellow-servants in handling the same. We discover nothing in the testimony to take the case at bar out of the full application of this proposition. The plaintiff's intestate must be taken to have assumed the risk of handling this car as one in bad order, which it therefore might be dangerous to handle in the ordinary way, and as to which, in the absence of any definite information as to the respect in which it was defective, the burden of ascertaining the defect and source of danger was cast upon and assumed by him. As he took this risk and burden upon himself, he cannot hold the defendant responsible for it."[8]

[4] Whiting v. Sullivan, 7 Mass. 107.

[5] Crane v. Bandouine, 55 N. Y. 556.

[6] Mansur v. Botts, 80 Mo. 651.

[7] Kelley v. Chicago etc. Co., Sept. 6. 1886: 29 N. W. Rep. 173.

[8] Fraker v. R. Co., 32 Minn. 54; s. c., 19 N. W. Rep. 349; Watson v. H. & T. C. R. Co., 58 Tex. 434; Flannagan v. Chicago & N. W. R. Co., 45 Wis. 98; s. c., 50 Wis. 462 and 7 N. W. Rep. 337; Chicago R. Co. v. Ward, 61 Ill. 130; McCosker v. Long Island R. Co., 84 N. Y. 77; Whart. Neg. § 214; Thomp. Neg. 1009.

THE DOCTRINE OF RECEIVERS CERTIFICATES.

I. WHEN AUTHORIZED.

The practice of issuing receiver's certificates has grown up in the past few years. At first resorted to as an extraordinary expedient and only allowed on the ground that their issue was indispensable to make necessary repairs in order to preserve the property from destruction, the courts have, by degrees, relaxed somewhat from the strictness of rule and principle originally adopted, and now sanction their issue for a variety of purposes. In regard to certificates issued for necessary repairs, there appears to be no doubt, either on authority or principle. In a case[1] decided by the Supreme Court of the United States, Mr. Justice Bradley says: "The power of a court of equity to appoint managing receivers of such property as a railroad when taken under its charge as a trust fund for the payment of encumbrances, and to authorize

[1] Wallace v. Loomis. 97 U. S. 146.

such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable thereon for its re-payment cannot at this day be seriously disputed. It is part of the jurisdiction always exercised by the court by which it is its duty to protect and preserve the trust fund; it is undoubtedly a power to be exercised with great discretion and, if possible, with the consent of the parties interested in the fund."

The criterion of the propriety of issuing receivers certificates is the necessity of the expenditures which demand their issue.[2]

Is the issue of such certificates necessary for the preservation of the road. To preserve its value it generally must be continued in operation and sold as a going concern, and if the court has been obliged to take possession of it, to prevent the rapid diminution of value, the derangement and disorganization that would otherwise result, it is but proper that the court should borrow money for that purpose if it cannot otherwise do so, in sufficiently large sums by causing certificates of indebtedness to be issued. They are but a substitute for common methods by which money is raised for the use of a receiver in a particular case, a mode of appropriating, in advance, a portion of the value of the property in order to enable the court to save a greater portion thereof from destruction.[3]

Before authorizing the issue, the court should require a detailed statement specifying the items of the sums needed, and the purposes to which they are to be applied, supported by clear proof of the correctness thereof, and of the necessity for raising the money, and after proper notice to and hearing the parties interested. There cannot be too great caution exercised.[4]

In a case where it appeared by the report of the receiver that the railroad was in such need of repairs that it could not be operated with safety to the travelling public unless the repairs were made, the court authorized the making of the repairs and the issuing of receivers' certificates of indebtedness therefor, and declared the same to be a debt incurred for the benefit and protection of the property.[5]

In another case, the receivers upon their appointment, found in the possession of the company several locomotives held under a lease from the makers, and for which the rent was unpaid. Upon their application they were authorized to issue certificates of indebtedness to provide for the payment of such rent.[6]

As a general rule receivers will not be authorized to engage in the completion of unfinished roads, their legitimate function being the conservation of the road as it is.

It was said in a recent case,[7] "It is no part of the duty of a court of chancery to build railroads, and the assent of all parties interested in the property cannot make it one. A court of equity may authorize the receiver of a railroad to issue certificates of indebtedness * * * * for the purpose of raising funds to make necessary repairs and improvements, but it is a power to be sparingly exercised, and only used from sheer necessity, and to a very limited extent."

There have been, however, exceptions to this rule. Where, to prevent a valuable land grant in favor of a railroad from lapsing, a receiver was appointed, at the instance of the bondholders, whose principal security was the land, and was empowered to borrow money by issuing certificates to complete certain unfinished portions of the road.[8]

And again, where it became necessary, to insure the safety of the trains, that a portion of a railroad which had beeen built in a hasty and temporary manner should be rebuilt in a substantial and permanent way, the same method to meet the expenses was adopted.[9]

Not for convenience or ornament; not to lay out money in ways not essential to the preservation of the property, although the court may think the value of it will be thus increased; "not for the completion of an unfinished work, or the improvement, beyond

[2] Jones on Railroad Securities, § 535.

[3] Meyer v. Johnston, 53 Ala., 237, 348.

[4] Meyer v. Johnston, 53 Ala. 350; Wallace v. Loomis, 97 U. S. 146.

[5] Hoover v. Montclair, etc. R. R. Co., 29 N. J. (Eq.), 4.

[6] Coe v. N. J. Midland R. R. 27 N. J. (Eq.), 37.

[7] Credit Co. v. Arkansas Cent. R. R. 15 Fed. Rep. 46; Sandon v. Hooper, 6 Beav. 546; Shaw v. R. R. Co. 100 U. S. 602; Kennedy v. St. Paul & Pac. R. R. 2 Dill. 448; Stanton v. Ala. & Chattanooga R. R. 2 Woods, 506.

[8] Kennedy v. St. Paul & Pac. R. R. 2 Dill. 448.

[9] Stanton v. The Ala. & Chattanooga R. R. 2 Woods 506.

what is necessary, for the preservation of an existing one—but to keep it up, to conserve it as a railroad property," pending litigation, the court can borrow money for such purpose, if it cannot do so otherwise, by causing certificates of indebtedness to be issued; and then never in excess of such need. As from the nature of the property it must be continued in operation to prevent serious injury and impairment, the court may continue the running of trains and the usual business of the road, and if the income be insufficient for that purpose, it may provide the requisite means by creating charges upon the property.[10]

II. PRIORITY.

According to the weight of recent decisions there appears to be no doubt of the power of a court of equity to authorize the issue of receivers certificates which shall constitute a prior and paramount lien upon the property and funds, irrespective of the consent of the holders of prior securities.[11]

In a recent case[12] it was said: "It seems to be well settled that a court of equity has the power * * * to authorize its receiver to issue certificates of indebtedness and make the same a first lien upon the road for the purpose of raising funds to make necessary repairs and improvements. But it is a power to be sparingly exercised. It is liable to great abuse, and while it is usually resorted to under the pretext that it will enhance the security of the bondholders, it not infrequently results in taking from them the security they already have, and appropriating it to pay debts contracted by the court."

The case of Wallace v. Loomis, *supra*, furnishes an instructive commentary on the authority of the court in this regard. In that case, upon the filing of a bill by the trustees of the first mortgage on a railroad, the court appointed receivers, "with power to put the road and property in repair, and to complete any unfinished portions thereof, and to procure rolling stock, and to manage and operate the road to the best advantnge, so as to prevent the property from further deteriorating in value, and to save and preserve it for the benefit and interest of the first mortgage bondholders and all other persons having an interest therein," and with power also for these purposes, to raise money by loan to an amount stated by issuing certificates, "which should be a first lien upon the property." The final decree declared that the moneys raised by loan or advanced by the receivers, and expended on the road pursuant to the order were a lien paramount to the first mortgage and should be paid out of the proceeds of sale before such first mortgage bonds.

In another case,[13] where a decayed and dilapidated railroad came into the hands of receivers under a decree of the court, made in a cause brought by trustees of a first mortgage to foreclose the same, and it became necessary to borrow money in order to preserve the road and to complete some inconsiderable portions thereof, and to put it in a condition for the transaction of its business, the court authorized the receivers to borrow money for such purposes and made the sums so borrowed a lien upon the property superior to that of the first mortgage.

In a case[14] which arose upon the petition of a receiver to make certain necessary repairs to a railroad, the chancellor after authorizing the making of the repairs and the issuing of certificates to provide the means therefor said, "the certificates will be declared to be a debt incurred for the benefit and protection of the property, and to be a first lien upon it."

A recent case[15] in the Supreme Court of the United States, is an exhaustive and authoritative decision on the question of priority. Upon it being represented to the court that the road was in great need of repair, and in an unsafe condition to be operated, and required an immediate outlay for iron, ties,

[10] Meyer v. Johnston, 53 Ala. 237, 346; Jerome v. McCarter, 94 U. S. 734; Bank of Montreal v. Chicago, Clinton & Western R. R. 48 Iowa, 518; Barton v. Barbour, 104 U. S. 126; Un. Trust Co. of N. Y. v. Chicago & Lake Huron R. R. 7 Fed. Rep. 513; Turner v. Peoria & Springfield R. R. 95 Ill. 134; Swann v. Clarke, 110 U. S. 602.

[11] Miltenberger v. Logansport R. R. 106 U. S. 286; Un. Trust Co. N. Y. v. The Illinois Midland R. R. 117 U. S. 434; Wallace v. Loomis, 97 U. S. 146.

[12] Credit Co. v. Arkansas Cent. R. R. 15 Fed. Rep., 46, 49.

[13] Stanton v. The Ala. & Chattanooga R. R. 2 Woods, 506.

[14] Hoover v. Montclair & Greenwood Lake R. R. 29 N. J. (Eq.), 4.

[15] Union Trust Co. of N. Y. v. Illinois Midland Co., 117 U. S. 434.

and other materials, balasting and labor, the receiver was authorized to borrow a sum, specified in the order, and issue his certificates of indebtedness therefore, and further declared these certificates to be a first lien upon the property. He was also authorized to pay off tax liens, to replace the net earnings diverted from paying the operating expenses and ordinary repairs, and to pay for betterments. The learned judge, in passing upon the power of the court to authorize the issue of the certificates and to constitute the same prior liens; held, "That in regard to those issued for necessary repairs, there could be no doubt either on authority or principle." That those issued to pay the liens be allowed priority, those issued to replace net earnings, and to pay for worn out portions of the road, also for items, for wages due employees of the receiver, debts due from them to other railroad companies, and for supplies and damages, wages due employees of the road within six months preceding the appointment of the first receiver, and debts incurred for the ordinary expenses of the receivers in operating the road, should be allowed priority out of the *corpus* of the property, if there was no income fund. And further, in commenting upon and defining the power the court possessed, when dealing with cases of this nature, said: "Property, subject to liens, and claims, and debts of various characters and ranks, which is brought within the cognizance of a court of equity for administration, and conversion into money, and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court through officers. The character of the property gives character to the peculiar species of preservation which it requires. A railroad and its appurtenances is a peculiar species of property. Not only will its structures deteriorate, and decay, and perish if not cared for and kept up, but its business and good will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights, of the corporation which constructed it, were given not merely for private gain to the corporators, but to furnish a public highway, and all persons with the corporation as creditors or holders of its obligations, must necessarily be held to do so in the view that, if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property by a sale into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and under some circumstances it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public."

As we have before remarked, the principle upon which these certificates were originally issued, was to "preserve" the property. Bondholders and creditors were anxious that this should be done, and so a practice which was right, within its proper limits, has grown into a most dangerous abuse. The receiver is to take care of and "preserve" the property of the insolvent road, and for that purpose his certificates are good, but beyond that they are worthless. It is a monstrous perversion of well settled rights, that an officer of a court, subject to no supervision but that of the tribunal which appointed him, and which derives its information in most cases solely from him, should have the power to issue these certificates, as has been done in many instances, to the full value of the property to meet losses occasioned by his incompetence or desire to carry on a reckless railroad war, and make them a first lien upon it. Judge Baxter is reported to have expressed himself strongly, in a recent case[16] before the Circuit Court of the United States, against the practice of placing railroads in the hands of receivers. He cited the case of a railroad in Georgia, which cost $15,000,000. The receiver, who was in charge for 3 years, issued certificates to the value of $1,500,000, and when the road was sold, the proceeds were insufficient to pay the certificates.

The language of Miller, J.,[17] is pregnant with the true sentiment of the law, viz: "That the appointment of receivers, by the court, to manage the affairs of a long line of railroads continued through 5 or 6 years, is one of those judicial powers, the exercise of which can only be justified by the pressure of absolute necessity."

Equally pertinent is the language of Bar-

[16] Jones on Railroad Securities, p. 508 (note).
[17] Mil. & Min. R. R. v. Soulter, 2 Wall. 510.

rett, J.[18] "It is fundamental in the law that a receivership is only temporary—to serve an existing exigency of a temporary nature, and when that is done, it is to cease. The idea that a court, by virtue of its prerogative in that behalf, is to take upon itself the office of instituting a receivership to be perpetual, and to do the duty of a court in controlling, directing and enforcing the administration in the management of a business, for the profit and emolument of the parties interested, and not to serve a present exigency, rendering it necessary in order to prevent a failure of legal justice and right, has not yet been propounded."

It is within the province of the court, in aid of its judicial function, to exercise an *interim* management of a "going concern," with a view to the sale of it. But it is no part of its office to take upon itself the execution simply of schemes, or projects, either of private or public utility, and under the guise of "preserving and improving" the road, to create charges which sometimes, eventually, result in "improving" the holders of its obligations out of their property.[19]

III. NEGOTIABILITY.

Receivers' certificates are not commercial paper. The most that can be predicated of them is, that they are evidence in the hand of the holder that he is entitled to receive from the fund under the control of the court, the amount specified, if the fund is sufficient to pay in full all holders of such certificates, or if not sufficient, then only a *pro rata* share with other holders. Nearly every quality essential to the negotiability of commercial paper is wanting. In the first place, they are not payable unconditionally out of any particular fund. Then again, there is no personal liability upon anyone for their payment, only the fund or property which the court controls is bound, and that only when it is equitable to charge such fund with the payment of the money evidenced thereby.[20]

The attributes of commercial paper have been so often defined that it is needless and foreign to this article to go into any extended discussion of them. The principles laid down in Dawkes v. Lorane,[21] have been repeatedly affirmed as being authoritative. It is there said: "It must carry with it a personal credit, given to the drawer, not confined to court upon any thing or fund * * * he, to whom such bill is made payable, or endorsed, takes it upon no particular event or contingency, except upon the general personal credit of the person drawing or negotiating the same."

These characteristics are conspicuously absent in receivers' certificates.[22]

A learned judge says:[23] "In my judgment power, conferred upon receivers, to issue certificates, does not authorize the issue of a bond or other negotiable instrument which shall be good in the hands of a *bona fide* holder for the value, no matter what vice or infirmity attend its original creation. The paper issued must be governed by the authority under which it was issued, and not by the form which the receiver chose to give it."

In a recent case,[24] a certificate, issued by the receiver, was made payable to the party therein named, "or bearer," without authority from the court from which he obtained authority to act in the premises. The order of the court was that it should be made payable to such person "or order." On the back of the certificate was a printed copy of this order. This certificate was negotiated by mere delivery, and an attempt was made to enforce its payment by the parties holding it, on the ground that they were *bona fide* holders. It was held by the court, that the

[18] Vermont & Canada v. Vt. Cent. R. R. 50 Vt. 571; Taylor v. Phila. & Reading R. R. 9 Fed. Rep. 1; Gardner v. L. G. & D. R. Co. Law Rep. 2 Ct. App; Baker v. Backus, 32 Ill. 79; Voshell v. Hanson, 36 Md. 92; Meyer v. Johnston, 53 Ala. 237.

[19] Meyer v. Johnston, 53 Ala. 237; Snow v. Winslow, 54 Iowa, 200; Humphreys v. Allen, 101 Ill. 490; Burham v. Bowen, 111 U. S. 776; Un. Trust Co. v. Soulter, 107 Id. 591; Shaw v. R. R. Co. 100 Id. 602; Newbold v. P. & S. R. R. 5 Bradw. 367; Morrison v. Morrison, 7 De G. M. & G. 214; Bright v. North, 2 Phila. 216; Cowdray v. The R. R. Co. 1 Words. 331.

[20] Turner [illegible] ingfield R. R. 95 Ill. 134; Bank of Montreal v. C. C. & C. R. R. 48 Iowa, 518.

[21] Dawkes v. Lorane, 3 Wils. (K. B.) 207.

[22] Baird v. Underwood, 74 Ill. 176; Husband v. Epling, 81 Id. 172; Turner v. P. & S. R. R. 95 Id. 134; Mills v. Ken Kendall, 2 Black, 47; Harriman v. Sanborn, 43 Me. 128; West v. Foreman, 21 Ala. 400; Corbett v. The State, 24 Ga. 287; Un. Trust Co. N. Y. v. C. & L. H. R. R. 7 Fed. Rep. 513; Newbold v. P. & S. R. R. 5 Bradw. 377.

[23] Stanton v. The Ala. & Chattanooga R. R. 2 Woods, 510.

[24] Turner v. P. & S. R. R. 95 Ill. 134; Un. Trust Co. of N. Y. v. C. & L. H. R. R. 7 Fed. Rep. 513; Railroad Co. v. Howard, 7 Wall. 415.

certificate was not a negotiable instrument in the sense that will cut off equities or defenses as against innocent holders for value, but that it was subject to the same defenses in the hands of the holder, notwithstanding he may have in good faith paid full value therefor, as could be made against the original payee. And it further rested its decision on the broader ground that the certificate of the receiver was not commercial paper, and was not such an instrument as was assignable at common law, or under the statute.

In the case of Stanton v. The Alabama, etc. R. R., *supra*, the master in his report says: "These securities until within a few years were unknown, they are all directed to be issued by special appointees of the court clothed with special and limited powers, and in relation to a particular case * * * * they may be likened to the English debentures of a business corporation, as to which it has been well settled, that when issued by the directors without due authority under the seal of the company, they cannot be enforced by members of the company who have accepted them after being present at the meeting when the irregular issue was sanctioned, and a *bona fide* transferee of such debentures from such shareholders will stand in no better position, nor can strangers, or their assignees, enforce them where they were accepted by the first holders with knowledge that the condition on which they were issued had not been fulfilled." [25]

RICHARD F. STEVENS, JR.

New York City.

[25] *Re* Magdalena Steam Nav. Co. Johns. (Eng. Ch.), 690; De Winton v. Mayor of Brecon, 26 Beav. 533.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — PLEADING — MUNICIPAL CORPORATION—PRACTICE—NEW TRIAL.

NEIER v. MISSOURI PACIFIC RAILROAD CO.*

Supreme Court of Missouri, June 21, 1886.

1. *Municipal Corporations — Ordinance Regulating Movement of Trains.*—A city has authority to pass an ordinance regulating the movement of trains propelled by steam power within its limits.

2. *Practice—New Trial—Evidence as to Time of Filing Motion.*—Where the bill of exceptions and record shows that the motion for a new trial was filed within the time provided by law, this is sufficient.

3. *Contributory Negligence—When no Recovery can be had.* — The negligence of a plaintiff contributing directly to the cause of his injury, will prevent a recovery; that is, if but for his concurring and co-operating fault, the injury would not have happened, except where the more proximate cause is the omission of the defendant, after becoming aware of the danger to which the plaintiff is exposed, to use a proper degree of care to avoid the injury.

4. ——. *Undisputed Facts, Proper Instructions.*— Where the undisputed facts show the contributory negligence of the plaintiff, it is the duty of the trial court to declare to the jury the inference which the law draws from such facts.

5. ——. *Taking Case from Jury.*—Evidence examined, and case found to be one of contributory negligence, authorizing its withdrawal from the jury.

6. *Pleading Contributory Negligence.*— Where an answer states that if plaintiff suffered damages it was brought about, "either in whole or in part by her own carelessness and negligence contributing thereto," contributory negligence is sufficiently pleaded.

7. *Practice — Remanding Cause.*—Where the evidence discloses no grounds which would authorize a recovery, the cause should not be remanded for another trial.

Appealed from St. Louis Court of Appeals.

Louis Gottschalk, for respondent; *Thos. J. Portis*, for appellant.

Opinion states the facts.

SHERWOOD, J., delivered the opinion of the court:

Action for damages for injuries done the wife of Joseph Neier, her co-plaintiff, by one of the locomotives of the defendant's company. On trial had, the jury returned a verdict for $4,000 damages, and on appeal to the St. Louis Court of Appeals the judgment was affirmed. 12 Mo. App. 25. At the same term of the circuit court Joseph Neier also recovered against the defendant for the same injury the sum of $2,085 in the action brought in his name alone. 12 Mo. App. 35. In that case, as in this, the question involved as to the validity of ordinance (10,305), is to be ruled against the defendant, following the rulings made on that point in the cases of Merz v. R. R., 22 Cent. L. J. Mo. Ad. lxviii, and Bergmann v. R. R., 22 Cent. L. J. 550, decided at the present term, but owing to the amount recovered in this case, the pecuniary jurisdiction of this court attaches, and this necessitates an examination of the merits of the cause.

1. Preliminary to this, however, it is insisted that such examination cannot be made, for that it does not appear that the motion for a new trial was filed at the same term. The statute requires that "all motions for new trials * * * * shall be made within four days after the trial, if the term shall so long continue, and if not, then before the end of the term." Sec. 3707. Although

*S. C., 12 Mo. App., 25.

the statement in the motion, that it was made "within the time provided by law," is no evidence whatever of that fact, yet the bill of exceptions shows that the trial took place on the 11th day of February, and the record proper of the proceedings had in open court shows that the motion was filed on the 12th of February. This is sufficient to show that the motion was filed at the same term and within four days after the trial, no order of adjournment till court in course appearing on the record. For this reason Welsh v. City, 75 Mo. 71, and similar cases do not apply.

2. Coming now to the merits of the cause, no attempt will be made to examine any of the instructions given or refused, except the one in the nature of a demurrer to the evidence asked by defendant's counsel at the close of the testimony, as the point thereby taken, if well taken, precludes any necessity for further examination.

The evidence discloses: That Catherina, the wife, was accustomed for seven years prior to the accident in question to drive the milk wagon of her husband, who was a dairyman, through the streets of St. Louis, and in the neighborhood and at the locality where the collision occurred, and there to deliver milk to his customers; that she was perfectly conversant with the running of trains in that vicinity, and of the time of their arrival and departure, seeing them as she did when going her daily rounds; that, on the morning of the accident, August 7, 1880, the train was due at the locality of its occurrence ten minutes after six; that she was fully aware of this when she reached the vicinity of the point where she was afterwards injured; that on her arrival there she was met by a flagman, who directed her to drive on a vacant lot which was near the corner of Third and Poplar streets, as "the train was coming pretty soon;" that after remaining on the lot a little while she left her wagon there, took milk to a customer near by, went into the basement, took a drink of coffee and remained in the house about ten minutes; on her return, seeing no flagman, she drove her wagon from its place of security down Poplar street toward the river, from which direction and on which street the expected train would come, until she came to Mrs. Sauer's, one of her customers, who lived on that street between Main and Second; when she arrived at that point it was twenty minutes past six o'clock and the train past due ten minutes, as she well knew and testified, but she proceeded to measure out milk for her customer, and while thus engaged a policeman told her the train was coming, and she heard some one else say "Hurry up," and in her endeavor to cross the track and reach an alley, the locomotive struck the rear end of the wagon and threw her out. The above is the substance of her testimony.

Other testimony in the case discloses that had the wagon remained where it was, the width of the street was sufficient to have let the train pass without striking the wagon; that the engineer of the train did what he could to prevent the injury, after discovering the danger; that if she had urged her horse out of a walk she would have crossed the track, as she only had some forty feet to traverse in order to be safe; that she was always slow in getting out of the way of trains; that on some half a dozen previous occasions the trains had to be stopped in order to let her get out of the way; that on this occasion she could have seen the flagmen who were flagging the train as it came up from the levee and made the curve into Poplar street, and that she could have seen the smoke of the train as it came up the levee; indeed, she admits that she saw the smoke of the approaching train, as she looked when endeavoring to cross the track, after having been warned by the policeman and the flagman. The testimony also shows that the train was running from sixteen to eighteen miles an hour, and had to do so in order to ascend the grade, and that the flagmen were all at their posts doing what in them lay to signal and stop the train.

Upon these undisputed facts should the instruction asked by defendant's counsel have been given?

I am of opinion that it should, and these are my reasons therefor: It is said to be a rule, without exception or qualification, the negligence of plaintiff contributing directly to the cause of his injury will prevent his recovery. Dunkman v. R. R. 16 Mo. App. 547.

And "one who is injured by the mere negligence of another cannot recover at law or in equity any compensation for his injury if he, by his own or his agent's negligence or wilfull wrong, proximately contributes to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him, except where the mere proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him. * * It is not essential to this defense that the plaintiff should have been, in any degree, the cause of the act by which he was injured. It is enough to defeat him, if the injury might have been avoided by his exercise of ordinary care. The question to be determined in every case is not whether it contributed to the injury of which he complains; neither is it necessary that the plaintiff's negligence should have contributed to the injury in any greater degree than the negligence of the defendant." Sherman & Redfield Neg, §§ 25-34. The same learned authors elsewhere say: "The rule which denies relief to a plaintiff guilty of contributory negligence is based less upon considerations of what is just to defendant than upon grounds of public policy, which requires, in the interest of the whole community, that every one should take such care of himself as can reasonably be expected of him." Sherman & Red. Neg. § 42.

And Wagner, J., in Hueslenkamp's case, 37 Mo.

537, observes: "When there has been mutual negligence and the negligence of each party was the proximate cause of the injury no action whatever can be sustained by either, for the reason that as there can be no apportionment of the damages there can be no recovery."

It is the well-settled law of this State what the duty is of a person who approaches a railroad crossing or track, and comes within actual or probable reach of the dangerous machinery thereon employed. He must use his eyes and his ears; he must look and he must listen. Failing to observe such ordinary precautions, such natural promptings of the dictates of prudence and of the very instinct of self-preservation, the law will afford him no remedy and grant him no redress for a loss or injury which results from his own lack of even the minimum of care, notwithstanding there may have been remissness in duty on the part of those managing the train in giving the customary signals, or in using an undue rate of speed.

In a word, that negligence of a plaintiff directly contributing to the injury complained of, or in contributing in equal degree thereto, precludes any recovery by him, unless the defendant, after becoming aware of the danger to which the plaintiff has by his own imprudence exposed himself, omits to all proper care to avoid injuring him. Sherman & Red. Neg., §§ 25 and 34, *supra*; Henze v. R. R. 71 Mo. 638; Zimmerman v. R. R. 71 Mo. 483; Purl v. R. R. 72 Mo. 168, and cases cited; Hixson v. R. R. 80 Mo. 335; Bell v. R. R. 72 Mo. 50; Powell v. R. R. 76 Mo., 80; Lenix v. R. R. Ib. 36. And it is the duty of the court where the facts of the case showing contributory negligence are undisputed to declare to the jury the inference which the law draws from such facts. Ib.

If the facts in this case do not constitute a clear case of contributory negligence, such negligence as ought to take the case from the jury, and let the law draw the conclusion, then no case can be found in the books to warrant such action to be taken bo the trial court.

Not only was the plaintiff repeatedly warned of the approaching train, not only could she have heard it if she listened, or seen its approaching smoke had she looked; bnt aside from all that, she knew this particular train was coming and might appear any moment from the direction her horse was facing.

In such a case, the giving of signals or the warning of flagmen, brought neither notice to her ears nor knowledge to her mind. Her act cannot therefore be characterized as any other than one of extreme rashness. Kelly v. R. R., 11 Mo. App. 1.

3. But it is insisted that the defense of contributory negligence was not pleaded.

The answer sets forth: "That any damage suffered by the plaintiff, Catherina, was brought upon herself, either in whole or in part, by her own carelessness and negligence contributing thereto. This is sufficient. Facts do not have to be pleaded nor evidence set forth in a case of this kind. Bliss Code Plead., § 211. And what would be sufficient in an allegation of negligence in a position ought to suffice in an answer. It is settled law in this State, that a general averment of negligence in a petition, without specifying the particular act complained of, will be sufficient. Schneider v. R. R. 75 Mo. 295; Carlisle v. Keokuk, 33 Mo. 40.

The judgment should be reversed, and as the evidence discloses no ground which would authorize a recovery, the cause should not be remanded. All concur.

NOTE.—A recent author has said that "to constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury." Proceeding farther, he says: "Did the plaintiff exercise ordinary care under the circumstances? Was there a proximate connection between his act or omission and the hurt he complains of? These are the vital questions when contributory negligence is the issue." [1]

In a Wisconsin case it is said that "if the plaintiff was guilty of any want of ordinary care and prudence (however slight), which neglect contributed directly to produce the injury, he cannot recover." [2]

In an Indiana case it was said that, "Where there is mutual negligence, if the defendant can avoid the accident by reasonable care and skill, we suppose the plaintiff cannot recover; so, where the negligence of the plaintiff is proximate, and the defendant cannot, by ordinary care, avoid the accident." [3]

In a New York case it was said that "the party injured must have been entirely free from any degree of negligence which contributed to the injury; *i. e.*, of any negligence without which the injury would not have happened. The law says to the defendant, if you have, by simple negligence, caused this injury, so far as you are concerned the ground of action is complete. At the same time it says to the defendant, although, so far as the defendant's acts are concerned, the case is made out, and you cannot prevail, if you have, by your simple negligence, helped to bring about the injury." [4]

In another case it was said, which will serve as an illustration, "that although the plaintiff was guilty of negligence in not having a man at the helm of his boat, it was a matter of no consequence, unless the absence of a helmsman on the plaintiff's boat contributed to the injury, and that the want of a helmsman on the plaintiff's boat did not excuse the negligence of the defendant, which caused the injury." [5]

It is not necessary that the contributory negligence be an element or factor in producing the force causing the injury complained of, to defeat the action. "It is sufficient if the plaintiff's negligence materially contributes to this injury, whether it contributes to the force causing the injury or not." [6]

While "any want of ordinary care, even in a slight

1 Beach on Contributory Negligence, 7.

2 Cremer v. Portland, 36 Wis. 92.

3 Indianapolis, etc. R. R. Co. v. Wright, 22 Ind. 376.

4 Wilds v. Hudson, etc. Co. 24 N. Y. 430.

5 Hoffman v. Union F. Co of Brooklyn, 47 N. Y. p. 185, referring to a previous case where the point is decided, viz: Haley v. Earle, 30 N. Y. 208; See Butterfield v. Forrester, 11 East. 58; Davies v. Mann, 10 M. & W. 546; Evansville, etc. R. R. Co. v. Hiatt, 17 Ind. 102; Savage v. Corn Exchange Fire etc. Ins. Co. 36 N. Y. 655.

6 Abend v. Terre Haute, etc. R. R. Co. (S. C. Ill.) 19 C. L. J. 350

degree, which directly contributed to the injury" will bar the right to damages; yet "negligence" on the part of the plaintiff, "in the slightest degree," will not necessarily, and it is error to so charge the jury.[7]

In Dreher v, Town of Fitchburg,[8] the court was asked to charge that "slight negligence" on the part of the plaintiff, which contributes directly to the injury, would prevent a recovery. This the court refused to do; and on appeal it was said: "To have given the instruction as drawn, would therefore have been equivalent to telling the jury that such a want of care on the part of the plaintiff, which contributed directly to the injury would have prevented a recovery. But such is not the law. To require of the mass of mankind that extreme degree of care which only persons of extraordinary prudence possess, would be to require an impossibility. It would be to deliver them up to the injury by the negligence, carelessness and recklessness of others, without redress."

The want of ordinary care in order to defeat the plaintiff's action, may be, in point of time, either before,[9] or subsequent to the negligence of the defendant.[10]

It is not always easy to say when a negligence case should be taken away from the jury. Of course, if the case is such that the appellate court will reverse it because of contributory negligence as shown by the evidence, it is such a case as will justify the trial court in directing a verdict for the defendant.

There are but few instances in which the courts has declared that a party is guilty of contributory negligence, or few instances in which the courts have held a given state of recurring facts to show no right of recovery in a plaintiff, because of his lack of ordinary care. One of these is where a person is injured by a passing railway train and he has failed to look out for it before getting upon the track.

In a negligence case it was said that "the case, however, must be a very clear one to justify a court in taking upon itself this responsibility; (taking the case from the jury,) it must present some prominent and decisive act in regard to the effect and character of which no room is left for ordinary minds to differ. Accidents occur, and injuries are inflicted under an almost infinite variety of circumstances, and it is quite impossible for the courts to fix the standard of duty and conduct by a general and inflexible rule to all cases, so that a departure from it can be pronounced negligence in law.[11]

In New York, Judge Folger said: "The rule established, and as I think the true one, is, that all the circumstances of each case must be considered in determining whether, in that case, there was contributory negligence or want of ordinary care, and that it is not ground to select one prominent and important fact which may occur in many cases, and to say, that being present, there must, as matter of law, have been contributory negligence. The circumstances vary infinitely, and always affect, and more or less control each other. Each must be duly weighed and relatively considered before the weight to be given to it is known.[12]

Judge Cooley, with his usual clearness and conciseness, has given the following rule: "When the question arises from a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions have been drawn to the jury. The inference to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ."[13]

After giving some examples of extreme cases in which a court will direct the jury in negligence cases, Mr. Justice Hunt, in the often cited case of Railroad v. Stout, 17 Wall. 657, said: "But there are extreme cases, the range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man, would infer that proper care had not been used, and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases and those a-kin to it that the law commits to the decision of a jury."[14]

"The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find. It can very seldom happen that the question is so clear from doubt that the court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff. It is not the duty of the court in such cases, any more than in any other. to usurp the province of the jury and pass upon the facts. And the non-suit should only be granted in such cases where the evidence of the misconduct on the part of the injured party is so clear and irresistible as to put the case on a par with those cases where a non-suit is granted for a failure to introduce evidence sufficient to go to the jury upon some point essential to the plaintiff's case. The fact must be so clear that, looking upon the plaintiff's case in the most favorable light, and giving him the benefit of all contraverted questions, the court can see that a verdict in his favor must necessarily be set aside."[15]

"It by no means necessarily follows, because there is no conflict in the testimony, that the court is to decide the issue between the parties or a question of law. The fact of negligence is very seldom established by such direct and positive evidence, that it can be taken from the consideration of the jury and pronounced upon as a matter of law. On the contrary it is almost to be reduced or an inference of fact from several facts and circumstances disclosed by the testimony, after their

7 Ranon v. Uttech, 46 Wis. p. 590; Dreher v. Town of Fitchburg, 22 Wis. 675; Walker v. Westfield, 39 Vt. 246; Brownell v. Flagler, 5 Hill. 282; Inman v. Galt, 7 B. Mon. 538; Davies v. Mann, 10 M. & W. 546; New Haven Steamboat, etc. Co. v. Vanderbilt, 16 Conn. 420; Wright v. Brown, 4 Ind. 95.

8 22 Wis. 675.

9 Illinois, etc. R. R. Co. v. Hall, 72 Ill. 222; Carroll v. Minnesota, etc. R. R. Co. 13 Minn. 930; Pennsylvania R. R. Co. v. Morgan, 82 Pa. St. 134; Illinois, etc. R. R. Co. v. Hetheringfon, 83 Ill. 510.

10 Butterfield v. Forrester, 11 East. 60; Jackson v. Co. Comr's. 76 N. C. 282; Martensen v. Chicago, etc. R. R. Co. 60 Iowa, 705; Brown v. Milwaukee, etc. R. R. Co. 22 Minn 165; or cotemporary therewith: O'Brien v. McGlinchy, 68 Me. 552; Chicago, etc. R. R. Co. v. Beeker, 76 Ill. 26; s. c. 84 Ill. 483; Doggett v. Richmond, etc. R. R. Co. 78 N. C. 305.

11 Cumberland Valley R. R. Co. v. Mangans, 61 Md; — s. c. 23 Am. L. Reg. 518.

12 Morrison v. Erie R. R. Co. 56 N. Y. 302.

13 Van Stimburg's Case, 17 Mich. 99.

14 See Robson v. The N. E. Ry. Co., L. R. 10 Q. B. 271; s. c. 12 Moak's Rep. 302.

15 Schierhold v. North Beach & Mission R. R. Co. 40 Cal. 447; See Jamison v. San Jose & Santa Clara R. R. Co. 55 Cal. 593; s. c. 3 Am. & Eng. R. R. Cas., 350.

connection and relation to the matter in issue have been traced, and their weight and force considered. In such cases the inference cannot be made without the intervention of a jury, although all the witnesses agree in their statement, or there be but one statement, which is consistent throughout."[16]

Courts, however, have adopted the rule that if one fails to look for the train at a railroad crossing before he enters upon the track, and which he would have seen if he had looked, or would have heard if he had listened, in time to have avoided injury, he is guilty of such contributory negligence as precludes a recovery.[17] And the neglect of the engineer of the train, to give proper signals, does not excuse the person injured.[18]

In such instances, where the facts are undisputed, the court may direct a verdict for the company.[19]

Crawfordsville, Ind. W. W. THORNTON.

[16] Ireland v. Plank-road Co. 13 N. Y. 533; See Pennsylvania R. R. Co. v. Barnett, 59 Pa. St. 263; T. & R. Ry. Co. v. Murphy, 46 Tex. 366; Wilson v. Southern Pacific R. R Co., 9 Am & Eng. R. R. Cas. 161; s. c. 7 Id. 400; Dolfinger v. Fishback, 12 Bush. 478; Paducah & Elizabethtown R. R. Co. v. Letcher, 12 Am. & Eng. R. R. Cas. 61; Patterson v. Wallace, 1 McQueen, H. L. Cas. 748; Mangam v. Brooklyn R. R. 38 N. Y. 455; Quimby v. Vermont Central R. R. 23 Vt. 387; Pfau v. Reynolds, 53 Ill. 212; Catawissa R. R. Co. v. Armstrong, 52 Pa. St. 282; Treat v. Boston, etc. R. R. Co. 131 Mass. 371; Wohlfahrt v. Beckert, 27 Hun. 74; Cotton v. Wood, 98 E. C. L. 566.

[17] Wilds v. Hudson R. R. R. Co., 24 N. Y. 430; Salter v. Utica, etc. R. R. Co. 88 N. Y. 42; Chicago, etc. R. R. Co. v. Adler, 56 Ill. 344; Sweeney v. Old Colony R. R. Co. 10 Allen, 368; Poole v. North Carolina R. R. Co. 8 Jones (N. C.) 340; Cleveland, etc. R. R. Co. v. Terry, 8 Ohio St. 570; Central R. R. Co. v. Dixon, 42 Ga. 327; Dodge v. R. R. Co. 34 Iowa, 279; Ormsbee v. Providence R. R. Co. 14 R. I. If the eye-sight or hearing of the person injured is defective, the greater care is required of him. Evansville, etc. R. R. Co. v. Hiatt, 17 Ind. 102.

[18] Chicago, etc. R. R. Co. v. Houston, 97 U. S. 542; (cited 19 Blatchf. 537; 2 McCrary, 273; 30 N. J. Eq. 241, 243, 609; 67 Mo. 676; 71 Mo. 489; 69 Ala. 109; 44 Am. Rep. 506;) Gorton v. Erie R. R. Co. 45 N. Y. 660; Hevins v. Erie R. R. Co. 41 N. Y. 296; Hill v. Louisville, etc. R. R. Co. 9 Heisk. 823; Chicago, etc. R. R. Co. v. Triplett, 38 Ill. 482; Peoria, etc. R. R. Co. v. Stiltman, 88 Ill. 529; Memphis, etc. R. R. Co. v. Copland, 61 Ala. 376; St. Louis, etc. R. R. Co. v. Mathias, 50 Ind. 65; Karle v. Kansas City, etc. R. R. Co. 55 Mo. 476; Com. v. Fitchburg R. R. Co. 10 Allen, 189; Pennsylvania R. R. Co. v. Beale, 73 Penn. St. 504; Wilcox v. Railroad Co. 79 N. Y. 358; Railroad Co. v. Crawford, 24 Ohio St. 631; Dacomb v. Buffalo, etc. R. R. Co. 27 Barb. 221; Cook v. Central R. R. etc. Co. 67 Ala. 533; Murray v. Pontchartrain R. R. Co. 31 La. Ann. 490; Indianapolis, etc. R. R. Co. v. McLin, 82 Ind. 435; Bunting v. Central Pacific R. R. Co. 16 Nev. 277; Kansas Pacific R. R. Co. v. Richardson, 25 Kan. 391.

[19] Chicago, etc. R. R. Co. v. Van Patten, 64 Ill. 510; Chicago, etc. R. R. Co. v. Damerell, 81 Ill. 450; Allyn v. B. & A. R. R. Co. 105 Allen, 77; Morse v. Erie R. R. Co. 69 Barb. 490; C. C. C. & I. R. R. Co. v. Elliott, 28 Ohio St. 340; Lake Shore, etc. R. R. Co. v. Miller, 25 Mich. 274.

WILL — CONSTRUCTION — LIFE ESTATE — LIMITED POWER TO DEVISE.

WRIGHT v. WRIGHT.*

New Jersey Court of Chancery, May Term, 1886.

A husband, by his will, provided as follows: "I give and bequeath all my property, both real and personal, * * * * to my wife, Elizabeth, to use or dispose of in any manner that she may think proper during her lifetime, and at her death may by will dispose of the same between my children and grandchildren as she may think proper." *Held*, that her interest in the property so given was a life estate, with a discretionary power of testamentary disposition among testator's children and grandchildren, but without power to entirely exclude any of them.

Bill for construction of will, etc.

Mr. E. M. Colie, for complainants.

THE CHANCELLOR.

The question presented for decision is whether the complainants, who are executors of the will of Elizabeth Richards, deceased, can lawfully execute the power to sell land given to them by the will. The land was owned by William Richards, the husband of the testatrix. He predeceased her and died seized of it. By his will he disposed of his estate as follows:

"I give and bequeath all my property, both real and personal, that I die possessed of, both in the State of New Jersey and the city of New York (after my funeral expenses and debts shall be paid), to my wife, Elizabeth Richards, to use or dispose of in any manner that she may think proper during her life-time, and at her death may by will dispose of the same between my children and grandchildren as she may think proper."

By her will she ordered her executors to sell all her estate, both real and personal, within one year from the date of her decease; she charged her estate with the payment of her debts, and a sum sufficient for the erection of a suitable tombstone over her grave, and directed that out of the remainder of the property a legacy of $100 be paid to her daughter-in-law, the widow of Thomas Richards. She then directed that the residue of the property be divided into six equal shares, and gave one of them to each of her three daughters "or to their respective" descendants; another to her grand-daughter, Frances, danghter of William Richards, "or her descendants;" a half share to each of her grand-children, Abby Ann and Ira L., children of Thomas Richards, or "to the descendants of each" of them, and a half share to each of her grand-children, Frances and Peter, children of Mary Garrison, "or to the descendants of each" of them. The testatrix had no real estate upon which the will could operate. Her estate in the real property devised to her by her husband's will was a life estate only. The property was given to her to use or dispose of in any manner she might think proper during her lifetime, with provision that she might dispose of it between [among] the testator's children and grand-children as he might think proper. The gift is not of an unlimited interest with a superadded power to dispose of the property by deed or will, but it is for life merely, with a power of appointment by will. In Bradley v. Westcott, 13 Ves, 445, where there was a personal estate to the sole use of the testator's wife for life, to be at her full, free, and

*Advance Sheets.

absolute disposal during her life, without liability to account, and after her decease certain specified articles and £500 were to go according to her appointment by will, and in default of appointment they were to fall into the residue, which was disposed of, it was held that the widow took an interest for life only, with a limited power of appointment. It was also held that the power given to her to dispose of the property was merely such power of disposition as a tenant for life might exercise. So, also, in Scott v. Josselyn, 26 Beav. 174, where the bequest was of the residue in trust to permit the testator's wife to receive the annual produce of the property for life, and also to apply to her own use such parts of the capital as she should think proper, and after her death to stand possessed thereof in trust for such persons as she should by will appoint, and in default of appointment, in trust to pay certain legacies—it was held that the widow took a life estate only, with power of disposition of the capital during her life and of appointment by will. And in Pennock v. Pennock, L. R. (13 Eq.) 144, where the gift was to the testatrix's husband in trust to stand possessed thereof and to enjoy the rents, profits and income for his own absolute use and benefit for life, with power to take and apply the whole or any part of the capital (the will gave him full power of sale) to and for his own benefit, and from and after his decease the property was to go over—it was held that the husband took a life estate only, with power of appointment, and that on his death without having exercised the power, the gift over took effect. In the case under consideration the gift was of the property to use and dispose of it as the donee might think proper during her life, and at her death she was to dispose of it among the testator's children and grand-children as she might think proper. The devise is expressly for life. Where the devise is expressly for life, with power of disposition annexed, an estate for life only passes. Bradley v. Westcott, *ubi supra;* Downey v. Borden, 7 Vr. 460.

Inasmuch as the testatrix had no real estate upon which her devise of real property could operate, it is to be presumed that she intended to execute the power by the devise. But she has not made the appointment according to the requirements of the power. She was to appoint the property among the donor's children and grandchildren as she might deem proper. Under such a provision both the children and grandchildren take. Barnaby v. Tassell, L. R. (11 Eq.) 363; Law v. Thorp, 4 Jur. (N. S.) 447; Fox's Will, 35 Beav. 163. She has appointed a share to each of her daughters "or their descendants." At least one of them, Sarah Jordan (or Jardine), had a child living at the death of the testatrix. He is named as one of the executors, and is one of the complainants. Under the terms of her husband's will, the testatrix was not at liberty to exclude any of the children or grandchildren; the power was not an exclusive one. While she had a discretion as to the shares to be given to them, she was bound to give each child and each grandchild a portion. Lippincott v. Ridgway, 2 Stock. 164. The word "grandchildren" is not used in a substitutionary sense, but as a word of purchase. The direction is "to dispose of the same between 'the testator's children and grandchildren as she may think proper." The words must, in the absence of anything in the context to lead to a diffrent construction, be construed according to their natural import. There is nothing in the context in this case to control the meaning. The gift to the wife and the appointment of executors are all the provisions contained in the will. Nor is the case of Lippincott v. Ridgway, above cited, in anywise opposed to this view. There the power was to dispose of the trust funds by will among the donee's brothers and sisters and their children, in such proportions as the donee might think fit. The court, indeed, did not recognize the right of the children to participate, except in substitution for deceased parents, but it will be seen, by reference to the will by which the power was conferred (and which will be found in Lippencott v. Stokes, 2 Hal. Ch. 122), that it appeared from the context that the gift to the children was merely substitutionary.

The appointment being invalid, it follows of course that the executors have no power to sell the property.

NOTE.—Where the powere is merely to appoint among several, each must have a share.[1] But if the trustee has a discretion, then he may exclude any of the specified beneficiaries.

As a gift to one or more of the children then living, in such manner as testator's executrix should think fit.[2] "To such of my children as she [testator's wife] shall think fit.[3] "Amongst all or such of his children as by their conduct should deserve it.[4] "To be at her disposal, provided it be to any of his children.[5] "For the use of her younger children as she should appoint."[6] "To be by her disposed of to and amongst his three daughters, in such proportion, and payable in such manner as she shall think fit to give it in her life."[7] "To and for the use of such child and children of the said J. G. * * * as the said J. G. should at

1 Gibson v. Kniven, 1 Vern. 66; Alexander v. Alexander, 2 Ves. Sr. 640; Vanderzee v. Aclom, 4 Ves. 772; Kemp v. Kemp, 5 Ves. 849; Butcher v. Butcher, 9 Ves. 382, 1 V. & B. 79; Marsden's Trust, 4 Drew. 594; Melvin v. Melvin, 6 Md. 541, 550; Michau v. Crawford, 3 Hal. 90, (109); Russell v. Kennedy, 66 Pa. St. 248; Little v. Bennett, 5 Jones Eq. 156; Stuyvesant v. Neil, 67 How. Pr. 16; See Pocklington v. Bayne, 1 Bro. C. C. 450; Harley v. Mitford, 21 Beav. 280; Booth v. Alington, 39 Eng. L. & Eq. 250; Brook v. Brook, 3 Sm. & Giff. 280; Howorth v. Dewell, 29 Beav. 18; Hawlew v. James, 5 Paige, 322; Haynesworth v. Cox, Harp. Eq. 177; Fronty v. Fronty, Bail. Eq. 517; Wickersham v. Savage. 58 Pa. St. 365; Loring v. Blake, 98 Mass. 253; Cruse v. McKee, 2 Head, 1; Gilbert v. Chapin, 19 Conn. 342.

2 Thomas v. Thomas, 2 Vern. 513.

3 Leafe v. Saltingstone, 1 Mod. 189, 2 Lev. 104.

4 Macey v. Shurmer, 1 Atk. 389.

5 Tomlinson v. Dighton, 1 P. Wms. 149.

6 Coleman v. Seymour, 1 Ves. Sr. 209.

7 Maddison v. Andrew, 1 Ves. Sr. 57.

any time * * * limit, direct or appoint."[8] The residue to E. for her life, "and after her decease the same unto his children, to be parted among them as she should think proper."[9] "In such shares and proportions as she should by her will direct, limit or appoint."[10] "To any one of my own family she may think proper."[11] "To such of his mother's poor relations as W., his heirs, executors and administrators for the time being should think objects of charity."[12] "Unto and amongst of her relations, at such times and in such manner and proportions as he is his discretion should judge most proper."[13] "Unto and amongst all such child or children of S., in such parts, shares and proportions, manner and form, as J., should * appoint."[14] "To divide among A.'s children, in such proportions as A. should appoint by will."[15] "To and amongst my other children or their issue, in such parts, shares and proportions, manner and form as my said daughter shall by deed or will appoint."[16] "For such child or children" of the marriage, and if more than one, in such shares as the survivor should appoint."[17] To testators's wife, that she might, "give her children such fortunes as she should think proper, or they deserve."[18] "To the heirs of his body, in such manner and shares as he may see fit to divide it among them, which he shall have full power to do as he pleases."[19] "With full power to devise and bequeath the same, or any part thereof, to my relations of the H. family, as she shall in her discretion select."[20] Among the children of the testator's two brothers, "in such manner and proportion as he shall think proper."[21] "To pay and distribute the principal among such of M.'s children as the said M. by her last will should appoint."[22] "At their death to have the privileges to will to my daughter S.'s children or my son T.'s children, just as they see proper."[23] For the benefit of the testatrix's brothers and sisters, as the trustee might from time to time judge the testatrix would have done if she could have foreseen the circumstances.[24] The cases of Garthwaite v. Robinson,[25] which held that under this trust, viz, "to dispose of the same, in such manner as she thinks fit, amongst all or one or more of her children, if she should have any, and if she hath none, then amongst my present or future grandchildren, or their respective issue, as she like best," the tenant for life could not, wanting issue of her own, exclude the children of a deceased grandchild, who were living at testator's death; and Stolworthy v. Sancroft,[26] "to dispose of his said estate in such manner and amongst such issue as A. should appoint," holding that A.'s appointment amongst some only of her issue living at her decease was void for exclusiveness, were disapproved in Vale's Trusts.[27]

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[8] Swift v. Greyson, 1 T. R. 432.
[9] Morgan v. Surman, 1 Taunt. 289.
[10] Mocatta v. Lousada, 12 Ves. 123.
[11] Grant v. Lynam, 4 Russ. 292; Harding v. Glyn, 1 Atk. 469.
[12] Brunsden v. Woolredge, Amb. 508; Atty.-Gen. v. Price, 17 Ves. 371. See Bennettt v. Honywood, Amb. 708.
[13] Supple v. Lawson, Amb. 729.
[14] Wollen v. Tanner, 5 Ves. 218.
[15] Abbott v. McGibbon, Low. Can. (Q. B. Div.) (1884), 18 Cent. L. J. 408.
[16] Veale's Trusts, L. R. (4 Ch. Div.) 61, 36 L. T. (N. S.) 634, (5 Ch. Div.) 622.
[17] Chamberlain v. Napier, L. R. (15 Ch. Div.) 614.
[18] Buller v. Buller, Amb. 660.
[19] Graeff v. De Turk, 44 Pa. St. 527.
[20] Huling v. Fenner, 9 R. I. 410.
[21] Cowles v. Brown, 4 Call. 477; Hudson v. Hudson, 6 Munf. 352.
[22] Ingraham v. Meade, 3 Wall. Jr. 32.
[23] Kerr v. Verner, 66 Pa. St. 326.
[24] Portsmouth v. Shackford, 46 N. H. 423.
[25] 2 Sim. 43.
[26] 10 Jur. (N. S.) 762.
[27] L. R. (4 Ch. Div.) 61, 36 L. T. (N. S.) 634, (5 Ch. Div. 622.

COMMON CARRIER—DISCRIMINATION—INTER-STATE COMMERCE — CONSTITUTIONAL LAW.

PROVIDENCE COAL COMPANY v. PROVIDENCE ETC. R. R. COMPANY.

Supreme Court of Rhode Island, May 5, 1886.

The provisions of Public Statute, Rhode Island, chapter 129, which forbid discrimination by a common carrier in his charges for transportation, apply to contracts made in this State for transportation to points beyond the State, and are not in conflict with the clause of the Constitution of the United States, art. 1, § 8, "Congress shall have power . . . to regulate commerce . . . with foreign nations and among the several States."

When a railroad is built by corporations located in and chartered by different States and these corporations consolidate, they make but one corporation whose acts and neglects are done by it as a whole.

Bill in equity for an account and an injunction. On exceptions to the answer.

The charter of the respondent corporation granted at the May session of the general assembly, A. D. 1844, contains the following provisions:

§ 15. The said Providence and Worcester Railroad Company are hereby authorized to unite with a railroad company which may be empowered by the legislature of the State of Massachusetts to construct a railroad from the northern terminus of the railroad authorized by this act, to the town of Worcester. And when the two companies shall have so united, the stockholders of one company shall become stockholders in the other company. And the two companies shall constitute one corporation, by the name of the Providence and Worcester Railroad Company, and all the franchises, property, powers and privileges granted or acquired under the authority of the said States, respectively, shall be held and enjoyed by all the said stockholders in proportion to the namber of shares or amount of property held by them respectively, in either or both of said corporations.

§ 16. One or more of the directors or other officers of said Providence and Worcester Railroad Company, as is provided in the preceding section, shall at all times be an inhabitant of this State, on whom processes against said company may be le-

* S. C. 6 Eastern Reporter, 677.

gally served; and said company shall be held to answer in the jurisdiction where the service is made and the process is returnable.

§ 17. The said company shall keep separate accounts of their expenditures in the States of the Rhode Island and Massachusetts respectively; and two commissioners shall be appointed, one by he governor of each of said States, to hold their offices for the term of four years; and to be reasonably compensated by said company, who shall decide what portion of all expenditures of said company and of its receipts and profit, properly pertain to that part of the road lying in said States respectively, and the annual report required to be made to the legislature of this State shall be approved by said commissioners.

§ 18. The said company and the stockholders therein, so far as their road shall be situated in this State, shall be subject to all the duties and liabilities of the Providence and Worcester Railroad Company created by the provisions of this act, and to the general laws of this State to the same extent as the said Providence and Worcester Railroad Company and the stockholders therein would have been had the whole line of said railroad been located within the limits of this State.

§ 19. The provisions contained in the four preceding sections shall not take effect until said provisions shall have been accepted by the stockholders of the said two corporations respectively, at a legal meeting called for that purpose.

And the charter granted by the general court of the State of Massachusetts, in A. D. 1844, contains similar provisions.

James Tillinghast, for complainant. *Charles Hart* and *Edwin Metcalf*, for respondent.

TILLINGHAST, J., delivered the opinion of the court.

The main questions presented for our consideration by the numerous exceptions to the defendants answer to the bill are, first, whether the provisions public statutes R. I., chapter 139, which prohibit discriminations being made by common carriers in the transportation of goods and merchandise, can be construed to affect contracts made in this State for transportation of goods and merchandise to points beyond the limits thereof; and, second, if they can be so construed, whether they are not to that extent in conflict with the "commercial clause" of the Constitution of the United States, which provides that "the congress shall have power to regulate commerce with foreign nations and among the several States." The defendants are common carriers owing and operating the Providence and Worcester railroad, which is situated partly in Rhode Island and partly in Massachusetts. The corporation has been consolidated under the statutes of both States. The bill seeks reliuf against the defendants for the discrimination alleged to have been made by them against the plaintiffs, both on contracts for the transportation of merchandise to points within the State, and also to points without the State, on the line of their road. Most of the exceptions are to the refusal of defendants to answer the allegations of the bill as to business transacted by them on contracts made for the shipment of merchandise to points without the State. The defendants contend that they are not called upon to answer these allegations, because they are only a Rhode Island corporation, owning and operating a railroad wholly in this State; that part of the road beyond the limits thereof being owed and controlled by another and distinct corporation, created by and only amenable to the aws of another State. By the express provisions of the defendant's act of incorporation in this State, of May, 1844, sections 15 to 18, the consolidated company forms but one corporation; and by section 18 it is expressly made subject to all the duties and liabilities of the Providence and Worcester Raiload Company created by the provisions of this act and to the general laws of this State to the same extent as said Providence and Worcester Railroad Comanpy; and the stockholders therein would have been had the whole line of said railroad been located within the limits of this State. The defendants, then, are a consolidated railroad company owning and operating a railroad extending, as alleged in the bill, from Providence, Rhode Island, to Worcester, Massachusetts; and we think it is well settled that such a corporation is but one entity, "and that the acts and neglects of the corporation are done by it as a whole." In Boston, etc., R. R. Co. v. New York, etc., R. R. Co., 13 R. I. 260, 262, this court, speaking of the Boston, Hartford and Erie Railroad Company, which was chartered by the State of Connecticut, says that it "was not a Rhode Island corporation except so far as it became, by virtue of the sale and action of the legislature, the successor of the Hartford, Providence and Fishkill Railroad Company. Yet as a foreign corporation it might be empowered to own and operate a railroad within this State, the policy of such authority being wholly within the discretion of the egislature." . . . "But the Boston, Hartford and Erie Railroad Company can hardly be regarded as a foreign corporation. True, it was not a Rhode Island corporation in the sense that it was chartered here, but it was subject to Rhode Island laws and control as fully as a domestic railroad company." And then, after reciting the legislative action concerning it, the court further says, 'it was thenceforth a corporation in this State, though not of this State."

In Scofield v. Lake Shore, etc., R. Co., 43 Ohio St.; s. c., 54 Am. Rep., wherein this question has recently been fully considered by the Supreme Court of Ohio, the court says: "A further question is presented, whether the decree for plaintiffs should be limited to and enforced only in this State, or should it extend to and be enforced against the defendant at all points reached by defendant's railroad, its branches and connecting lines?" "The district court finds that the defend-

ant is a consolidated company, its lines of road extending to various points in Pennsylvania, New York, Ohio, Indiana, Michigan and Illinois. It is an artificial person and the same person in all this territory, and this court has acquired jurisdiction of the person of the corporation and the right to enforce all proper decrees against it."

"The railroad is an entirety, whether within the State or without; and the artificial person, by the acts of the several States authorizing consolidation, has been created one and not two or more, and no reason is perceived why it may not be dealt with by the courts of either State that has procured jurisdiction." "This artificial person not only holds itself out, but does make contracts for the transportation of freight over its connecting lines as well as its own line, and it makes rates to points only reached by connecting lines. No reason is perceived why it should not be ordered to make no discriminations to the injury of the plaintiff in its rates to points thus reached. Of course it may, at any time, refuse to make any rates beyond its own lines; but if it makes rates to points on connecting lines, the rates should be equal to all." See also McDurffee v. Portland etc. R. Co., 52 N. H. 430; Peik v. Chicago, etc., R. Co., 94 U. S. 164, 176; Horne v. Boston, etc., R. Co., 18 Fed. Rep. 50.

This doctrine is now so fully settled that a review of the cases is quite unnecessary.

Construing the statute, then, to include contracts for the transportation of merchandise to points without the State on the line of the defendants' road, is it obnoxious to the constitutional provision before mentioned? We do not think it is. It is not, in our judgment, a regulation of commerce, within the meaning of the "commercial clause" as heretofore construed, either by the State courts or by the final arbiter of questions of that sort—the Supreme Court of the United States. It opposes no obstruction and causes no delay to commerce. Neither does it lay any tax thereon so as to make it obnoxious to the rule as laid down by the Supreme court of the United States in Hays v. Pacific Mail Steamship Co., 17 How. 596; Morgan v. Parham, 16 Wall. 471; Steamship Co. v. Port Wardens, 6 id. 21; Case of the State Freight Tax, 15 id. 232; Henderson v. Mayor of New York, 92 U. S. 259; Walling v. Michigan, 116 id. 446; Gloucester Ferry Co. v. Pennsylvania, 114 id. 196, and many others of the same class. It simply prohibits discriminations being made in favor of one, and against another, having occasion to use the facilities afforded for the transportation of goods, by common carriers under like circumstances, a substantial declaration of the common law doctrine upon this subject. Messenger v. Pennsylvania R. Co., 37 N. J. Law, 531: s. c., 18 Am. Rep. 754; Chicago, etc., R. Co. v. People, 67 Ill. 11. And although a statute of this sort may doubtless be properly said to effect commerce, yet, as held in the State Tax Railway Gross Receipts, 15 Wall, 284, 293, "it is not every thing that affects commerce that amounts to a regulation of it within the meaning of the Constitution." In Peik v. Chicago, etc., R. Co., 94 U. S. 164, in which the power of the Legislature of Wisconsin, to provide by law for a maximum charge to be made, for fair and freight, for the transportation of persons and property carried within the State, or taken up outside the State and brought within it, or taken up inside and carried without, was considered, the Supreme Court of the United States says:

"As to the effect of the statute as a regulation of inter-state commerce, the law is confined to State commerce, or such inter-state commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-state commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."

In the case of Chicago, etc. R. R. Co. v. Iowa, 94 U. S. 155, 161, the same doctrine was maintained.

The conclusion deducible from the numerous decisions bearing upon this subject, as well stated by the Supreme Court of Indiana in Western Union Telegraph Co. v. Pendleton, 95 Ind. 12; S. C. 48 Am. Rep. 692, "is, that the States cannot embarass commercial communication, abridge the freedom of commerce, discriminate in favor of the products of one State, lay burdens upon the instruments of commerce, or exact licenses from persons, natural or artificial, engaged in inter-State commerce." See cases there cited.

Accepting this as a summary of the law applicable to the case before us, we do not see that the statute under consideration is obnoxious thereto. Commercial intercourse is not thereby abridged or fettered, and no new duty or burden is imposed thereon. The defendants are only called upon to do, under a certain penalty, precisely what the common law declares it to be their duty to do without the statute, viz.: to treat all alike under similar circumstances—a mere police regulation.

The Supreme Court of Illinois has recently had occasion to construe a similar statute, and in so doing *inter alia*, says: "It is no doubt true that the statute to prevent unjust discrimination in the rates of charges of railroad companies, under which this action was brought, may affect commerce, but in our judgment it cannot be said to be a law regulating commerce among the States, within the meaning of the Federal Constitution. The law does not purport to exercise control over any railroad corporation except those that own or operate a railroad in the State, such corporations as have domestic relations with the people of the

State; and as we understand the decisions of the Supreme Court of the United States, similar laws enacted by State authority have been upheld and sustained, although such laws may affect commerce." The People v. Wabash, etc. R. R. Co. 104 Ill. 476. See, also, Hall v. DeCuir, 95 U. S. 485, 487; Peik v. Chicago, etc. R. R. Co. 94 id. 164; Chicago, etc. R. R. Co. v. Iowa, id. 155; Munn v. Illinois, id. 113.

The exceptions are sustained in so far as they are based upon the omission of the defendants to answer the allegations of the bill as to transactions reaching beyond the limits of the State.

WILL—CONSTRUCTIGN — "WITHOUT BODILY HEIRS."

THACKSON v. WATSON.*

Court of Appeals of Kentucky, September 11, 1886.

Will—Construction—"If He Lives so Long—"On Death Without Heirs."—Testator directed that his executor should control and manage the estate until his son was twenty-one years of age, and then, "if the son should live so long," the whole estate was "to be paid over and delivered up to him." The next clause of the will provided that, in case the "son should die without bodily heirs," the "real estate should be sold and converted into money, and distributed" among certain relatives. *Held*, 1. That the words "die without bodily heirs" were intended to refer back to the former clause, "if he should live so long," and that the son, having attained the age of twenty-one years, took the fee-simple. 2. That rules of construction will not be allowed to defeat the plain intention of the testator as gathered from the whole instrument.

Appeal from circuit court, Mason county.

This was an action brought by the plaintiff to cancel a mortgage given by him to the defendant. The mortgage was given to secure the defendant in the event of the plaintiff's title to certain lands, sold by him to the defendant, not being good. The lands sold were derived from the plaintiff's grandfather under the will set out in the opinion. Judgment for plaintiff, and appeal by defendant.

E. Whittaker and *L. W. Robertson*, for appellant, W. D. Thackston. *Cochran & Son* and *H. Wadsworth*, for appellee, Henry D. Watson.

PRYOR, J., delivered the opinion of the court.

William Watson, of the county Mason, died in the year 1870, leaving a last will and testament, and his widow and H. D. Watson, his only child, surviving him. His will is now before this court for construction. By various clauses of his will preceeding those from which this litigation has arisen, he made several special devises, and gave minute and specific directions to his executor as to the control and management of his estate for the benefit of his widow and son. By the eighth clause of the will, the executor was directed to rent out the land of the testator to the best advantage until his son arrived at the age of 21 years, and by the ninth clause, directed his executor to pay one-third of the net proceeds to his widow, and appropriate the other two-thirds to the benefit of his son as thereinafter directed. By the tenth clause, the testator devised the rest and residue of his estate, real and personal, to his son Henry Duke Watson, "to be paid over to him, and to be delivered up to him, by the executor when he should arrive at the age of twenty-one years, if he should live that long;" and then proceeded to direct the executor as to the manner of raising and educating him. The son having arrived at age, the executor delivered up to him the estate, and, being vested by the tenth clause just quoted, with an absolute fee, conveyed a part of the land devised to him by his father to the appellant, who now insists that his title is imperfect by reason of the eleventh and twelfth clauses of the will. In the eleventh clause of the will the testator provides that, in case his son shonld die without bodily heirs, then all testator's real estate shall be converted into money by the executor, and, out of the proceeds, make certain bequests to his relations then living, naming them. In the twelfth clause he provides that, in case his son should die without bodily heirs, the whole estate, after paying the particular bequests, shall be equally divided between certain of his relations therein named.

The appellant maintains that the tenth clause of the will, when construed with the eleventh clause gives to the son a fee-simple estate, subject to be defeated at any time by the happening of the event, viz., the death of the son without bodily heirs. On the other hand, counsel for the appellee insists that the son took the fee subject to be defeated upon the contingency only of his dying without bodily heirs before arriving at the age of 21 years.

The settled and well-understood construction in references to such devises seems to be that where an estate is given or devised with remainder over, but, in the event the remainder-man should die without a child or children, then to a third person, the words "dying without children or issue" are restricted or limited to the death of the remainder-man before the termination of the particular estate; and it is equally as well settled that if an estate is devised to one in fee, but if he die without issue, or without leaving a child or children, then to another, the first devisee takes a defeasible fee which is subject to be defeated in the event of his death, at any period, without issue. Birney v. Richardson, 5 Dana, 424; Pool v. Benning, 9 B. Mon. 623; 2 Jarm. Wills, 506.

Counsel for appellant argues, as no particular estate in interest preceded the devise to appellee, that under the last rule of construction, the appellant will be deprived of all title by the death of

*S. C., 1 Southwestern Reporter, 338.

the appellee at any time without leaving issue surviving him. The construction of a will, or any of its provisions, must be controlled by the intention of the party making it; and, when that intention is ascertained from the whole instrument, it should be adopted, and no rule of construction will be allowed to defeat the expressed or plain intention of the testator. General rules of construction will be followed when not inconsistent with the manifest intention of the testator: but, says Mr. Redfield, "the court will place themselves as far as practicable in the position of the testator, and give effect to his leading purpose and intention as indicated by the words of the will, construed with reference to all attending circumstances." The words contained in a particular clause of a will, when alone considered, may bring the devise within the operation of a general rule; but, when considered with reference to the whole will, a different construction must often prevail; otherwise the plain intention of the testator would be defeated. It is at least the intention of the testator that the court must look to in construing wills, and, when that intention is ascertained, the general rules of construction are to be applied.

Without, therefore, determining the nature of the devise to the executor,—whether he was vested with an interest in the estate or not,—he certainly had the control and management of the entire property until the son arrived at the age of 21 years, and then, by an express provision of the tenth clause of the will, the whole estate was "to be paid over and delivered up to him by the executor when he arrived at the age of 21 years, if he live that long." The eleventh clause of the will, following directly the provision of the tenth clause, under which the executor was to surrender the entire estate to the son, provides that, in case his son died without bodily heirs, then "I direct and will that all my real estate be sold by my executor, and converted into money, and distributed as therein directed;" and, when construing the two clauses together, as they should be, it is evident the plain meaning of the testator was that in the event the son died before the period at which the property was to be delivered to him, and all control over it surrendered by the executor then the executor was to sell the realty, and make distribution as provided by the subsequent provisions of the will. The two clauses, read together, direct, in subsance, the executor "to pay over and surrender to the son all the estate when he arrives at the age of 21, if he live that long; but if he should die before that time without leaving bodily heirs, the estate is to go to his collateral kindred."

In the case of Duncan v. Kennedy, 9 Bush, 580, the testator devised his estate to five persons, naming them, directing his executors to take possession and control of the property devised, until January, 1872, when the same was to be divided between the devisees; but further provided that, if any one of the five should die, then in that event it was to be divided between the survivors. It was held that, in order for the devise over to the survivors to take effect, it was necessary for the death of the first taker without issue to take place before January 1, 1872.

The testator, when having his will written, was evidently contemplating the death of his son before the period at which he was to have the complete control of the estate, because he directs the property to be delivered over to him if he is then alive; and, providing against the contingency of his dying before that time, proceeds to devise his estate to his collateral kindred in the event his son leaves no children. His executor is to sell, and make the distribution, and no such thought entered the mind of the testator as requiring the executor, after his son had arrived at age and taken the custody of the property, to regain the possession of it, if his son thereafter died childless, in order that he might sell, and distribute the proceeds to others. The remote devisees were living when the will was made, and they were to take in the event the contingency happened before the son reached the age of 21. The title of the son became indefeasible when he arrived at that age, and therefore the title to the land sold by him to the appellant is not incumbered by any claim that might be asserted under this will by the remote devisees.

Nor is the view of the question in conflict with the ruling of this court in Parrish v. Vaughan, 12 Bush. 97. In that case the devise to the grandson was these words: "But should he [the grandson] die before he arrives at the age of 21 years, or without lawful issue of his body, then, and in either of these events, the land shall revert back." It was held that, the grandson dying without children, the estate went back to the heirs of the original devisor. In order to vest the title, in that case, in the devisee, the grandson, it became necessary to substitute the conjunction "and" for the disjunctive "or," and, not only so, but to disregard the words "then and in either of these events." This the court refused to do, holding that the testator must have understood the meaning of the language used by him, and, having given an expression to his intention by using the language referred to, this court would not assume that such was not the meaning, and substitute other words with a view of showing a different intention than the face of the will presented.

In our opinion, the appellant has no cause to complain of his title, and the judgment is therefore affirmed.

WEEKLY DIGEST OF RECENT CASES.

1. AGISTMENT—*Lien of Agister on Foreclosure of Chattel Mortgage.*— Where S. placed a chattel mortgage executed to him by G. M. on a certain horse in the hands of I. M. to foreclose I. M. placed the horse in his own stable to be fed and cared for, and proceeded to advertise the horse for sale on foreclosure. Pending the sale, S. M., a personal security on the note to secure which the mortgage was given, tendered to S. the amount due on the note and mortgage, principal and interest. S. accepted the tender, and delivered upto S. M. the note and mortgage, and ordered I. M. to proceed no further in foreclosing the mortgage. *Held*, that I. M. had no lien on the horse for his feeding and care. (*Quære*—Editor C. L. J.) *Hale v. Wigton*, S. C. Neb. Sept. 8, 1886. 29 N. W. Rep. 177.

2. ATTORNEY AND COUNSELOR — *Contracts with Client—Onus as to Good Faith— Termination of Relation.*—An attorney who contracts with his client is subject to the *onus* of proving that, as respects the contract, no advantage was taken of the client's situation. But where a previously existing relation of attorney and client has come to an end, so that the parties are dealing, each for himself, at arms-length, this strict rule does not apply; but, to avoid the contract, (otherwise unobjectionable,) the client must show that it was procured by actual fraud. *Held*, that, upon the evidence in this case, a request for an instruction to the effect of this latter proposition was erroneously refused. *Tancre v. Pullman*, S. C. Minn., July 26, 1886. 29 N. W. Rep. 171.

3. BAIL AND RECOGNIZANCE — *Recognizance Defective—Common-Law Bond.*—A recognizance of the appearance of an accused person to answer to an indictment for felony, taken before and approved by an officer or person unauthorized by law, or where, under the facts of the case, the taking thereof is unauthorized by law, so that the same fails to be binding under the statute, *held*, *also*, to be void as a common-law obligation. *Dickinson v. State*, S. C. Nebraska, Sept. 8, 1886. 29, N. W. 184.

4. CONTRACT.—Where an employee is discharged because he will not continue to work for less than the agreed price, the employer cannot invoke a rule compelling the employe to forfeit wages already earned on his leaving the employ of the master. *Schietenger v. Bridgeport etc. Co.*, S. C. Conn. April 24, 1886. 6 East. Rep. 113.

5. ———. *Agreement to Pay Note and Mortgage Held by Third Party—Assignment.*—A. entered into a parol agreement with H., upon a sufficient consideration moving from the latter, to pay the amount of a note and mortgage held by L. against H. and subsequently L. sold the mortgage and the debt thereby secured to the plaintiff. *Held*, that that such agreement constituted a valid and binding obligation in favor of L.; and, being in the nature of additional security for the payment of the mortgage debt, passed with the assignment thereof as an incident, and the plaintiff could enforce the same action against A. *Lahmers v. Schmidt*, S. C. Minn., July 14, 1886. N. W. Rep. 169.

6. ———. *Wagers—Grain Contracts for Future Delivery.*—A contract for grain for future delivery is not, as matter of law, void as a gambling transaction; it must be shown to be but a bet to avoid it; and the mere payment of "differences" in settlement, is not sufficient to establish it to have been a wager. *Tomblin v. Callen*, S. C. Iowa, June 18, 1886. 22 Rep. 367.

7. CORPORATION — *Foreign Corporation — Stockholders.*—The liability of stockholders, or of the subscribers for stock of a corporation, to the creditors of the company, is governed by the laws of the State under which it is created. It is the settled law of this State that, in the absence of an express promise to pay for shares in a corporation, none is created by a mere subscription therefor. Nor is any created by the mere agreement to take shares. Where by the local laws of the State under which the corporation is created, a liability is imposed on stockholders which is wholly at variance with the laws of this State, the courts of this State are not required to enforce such liability. *New Haven etc. C. v. Linden etc. Co.*, S. J. C. Mass., July 6, 1886. 6 East. Rep. 663.

8. COVENANT—*Warranty— Eviction — Pleadinn — Evidence—New Trial—Motion, when Made—Covenant of Seizin Defined.*—In an action on a warranty deed for a breach of the covenant for quiet enjoyment, the plaintiff must allege and prove that he has been turned out of the possession of the granted premises, or of some part thereof, or has yielded the possession thereof to the paramount title. A motion for a new trial must be made in the terms, substantially, in which it may be allowed within the rules of law, or it will be denied. The covenant for title or of seizin is an assurance to the purchaser that the grantor has the very estate, in quantity and quality, which he purports to convey. If he has not such title, his covenant is broken immediately upon its being made. *Real v. Hollister*, S. C. Neb. Sept. 8, 1886. 29 N. W. R. 189.

9. CRIMINAL LAW— *Assaults with Intent—Indictment—Assault with Dangerous Weapons.*—An indictment for an assault with dangerous weapons, with intent to kill, under section 29, art. 2, c. 42, Wag. St. 449, providing for the punishment of an assault with a deadly weapon, or with any other means or force likely to produce death or great bodily harm, is sufficient if it alleges that the assault was made with an ax and a gun, with intent to kill, and that they were "deadly weapons" without the further allegation that they were "likely to

produce death." This allegation is only necessary when other means than deadly weapons are employed in making the assault. State v. Painter, 67 Mo. 84, followed. *State v. Pecora*, S. C. Mo. June 7, 1886. 1 S.W. Rep. 304.

10. ———. *Pleading—Indictment — Place.* — An indictment alleging, generally, an offense to have been committed in the county where it is found, if otherwise valid, is sufficient without any more particular designation of the precise locality. *State v. Sneed*, S. C. Tenn. June 10, 1886. 1 S. W. Rep. 282.

11. DAMAGES—*Depriving of Use of Mill.*—The rule of damages for wrongfully depriving a party of the use and possession of a portable saw-mill is the rental value or hire of the mill, or one of similar capacity, during the time it is thus withheld. Where the mill-owner has been compelled to pay a foreman under a subsisting contract during the time the mill was kept idle, and a watchman to take care of the same, he may recover such items of damages in additio to the rental value. *Wood v. Maryland*, Maryland Court of Appeals, July 15, 1886. East. Rep. 745,

12. DEED—*For Benefit of Creditors—Attorney and Client—Waiver.*—A creditor who participates in proceedings in equity for distribution of property sold under a deed of trust so far makes himself a party to the deed as to waive his right to deny its validity, and to have elected to surrender any lien he may have had upon the property, and to look to the proceeds of sale instead. But the attorney who recovered the judgment cannot, without express authority from his client, file the claim in the equity proceedings and thus waive his lien. *Horsey v. Chew*, Maryland Court of Appeals, June 24, 1886. 6 East. Rep. 748.

13. ———. *In Fraud of Creditors — Subsequent Mortgage—Foreclosure. R. L. 4155.*—A deed of land executed by a debtor to keep it from attachment, cannot be attacked by a petition under the statute to foreclose a subsequent mortgage executed by the debtor on the same land. The titles of adverse claimants cannot be litigated in a foreclosure suit. *Kinsley v. Scott*, S. C. Vt. August 7, 1886. 6 East. Rep. 775.

14. ———. *Registration — Quitclaim Deed — Construction.* — Where a quitclaim deed, conveying property, was made in 1848, and lost before record, but was substituted by a decree of court filed in 1881, and the same property was conveyed by the heirs of the grantor in 1874, *held*, that the claim of persons deriving title from the heirs of the grantee of the original quitclaim deed was good as against a purchaser in 1882 from persons claiming title from the heirs of the grantor. Words which are added in the latter part of a deed, for the sake of greater certainty, may be resorted to, to explain preceding parts which are not entirely clear. *Wallace v. Crow*, S. C. Texas, June 25, 1886. 1 S. W. Rep. 372.

15. EASEMENT—*Alley— Laid out between Lots of Same Owner—Purchaser — Rental Value — "Private Alley"—Designation by Common Owner.* — Where an alley-way has been laid out between the lots of the same owner, though it has been taken from the length of some of the lots, only, if its use is beneficial to another of the lots, and manifestly increases its rental value, the purchaser of such lot will take an easement in it. Where the common owner of lots has laid out an alley-way between them, that she has designated the way as a "private alley," must be construed, in an action to deprive one of the lot owners of its use, as intended to show its use for her lots, only; but for all of them. *Cihac v. Kleke*, S. C. Ill. May 15, 1886. 22 Rep. 398.

16. EQUITY—*Bill of Review — Opening Decree of Orphans' Court Confirming Trustees' Accounts —New Matter.*—An account of executors, who are also trustees under the will, confirmed by a decree of the orphans' court, can be reviewed, as a matter of right, only for error of law apparent on the face of the record, or for new matter which has arisen since the decree. As a matter of grace, a review may be granted for new proof discovered after the decree, which proof could not possibly have been used at the time when the decree was made. *Scott's Appeal*, S. C. Penn. May 3, 1886. 5 Atl. Rep. 671.

17. EVIDENCE—*Weight of Evidence—Record—Parol.*—Where, upon the trial of a cause, facts are proved on the part of the plaintiff, by parol testimony, within the pleadings, sufficient to establish plaintiff's case *prima facie*, none of such testimony being contradicted, and the defendant proves by record evidence, also within the pleadings, such facts as establish a complete defense, such evidence taken together, will not sustain a finding for the plaintiff. *Dickinson v. State*, S. C. Neb. Sept. 8, 1886; 29 N. W. Rep. 184.

18. EXECUTORS AND ADMINISTRATORS—*Will not Probated—Debts Paid—Title to Assets—Evidence Possession—Dying Declarations—Creditors—Administration—Estoppel by Conduct*—Debts of a testator, paid in good faith by his executrix and residuary life legatee, will be allowed against his estate, although the legatee took possession of the estate without proving the will. Where there is an issue as to title as between the estate of a husband and the estate of his widow, who was executrix and residuary life legatee under the husband's will, that will not having been probated until after the widow's death, it is error to admit testimony tending to prove that a certain sum of money was in the widow's possession at the time of her death, and that she made a dying declaration that it was intended to pay her debts. Creditors of a decedent who have failed to compel an administration of his estate cannot take advantage of the confusion resulting from such failure. *Jenks v. Breen*, Court of Chancery of New Jersey, Sept. 8, 1886; 5 Atl. Rep. 647.

19. FALSE IMPRISONMENT—*Damages—One Person Mistaken for Another—Execution of Warrant for Arrest Against Wrong Person.*—Where a person was imprisoned by mistake for another, such mistake may be considered in mitigation of damages and on the question of malice; but it will not justify the imprisonment, unless the mistake was caused or contributed to by the words or acts of the one imprisoned. An officer who executes a warrant against one person by arresting another is a trespasser. *Formwalt v. Hylton*, S. C. Texas, June 1, 1886; 1 S. W. Rep. 376.

20. GARNISHMENT—*Inter-State Garnishment.*—A debt by a foreign corporation to one of its employes at the place of its domicile, not being within the jurisdiction of our courts, can not be reached and subjected by a creditor here, by process of

garnishment against the corporation. Reversed; garnishee discharged. *Louisville, etc. Co. v. Dooley*, S. C. Ala. Dec. Term, 1885-86.

21. GIFT OF CORPORATE STOCK—*Agreement Against Public Policy.*—In an action for breach of contract for non-delivery of corporate stock, the defendant may show, as matter of defense, that the contract sued upon was part and parcel of a prior secret agreement between the plaintiff and the company, whereby the plaintiff was to subscribe for a large amount of the stock for the purpose of inducing others to subscribe, and that for so doing he was to receive, in addition to his subscription, the amount of stock in question as a gift from the company. *Nickerson v. English*, S. Jud. Ct. Mass. July 3, 1886; 6 East. Rep. 551.

22. INJUNCTION — *Actions at Law—Cross-Bill—Equity—Pleading — Answer — Striking Out.*—A cross-bill, after simply stating that two writs of attachment had issued and were served in an action of law, prayed for an injunction restraining such action pending a decision on a suit between the same parties in this court. *Held* that, while the facts in the chancery suit would justify an injunction, yet the omission to show in the cross-bill anything inferring that the action at law is still pending would be such an uncertainty as to prevent the awarding of the injunction. Portions of an answer that are merely amplifications or enlargements of what has already been sufficiently stated, or are statements that do not pertain to the issue between the parties, will be stricken out. *Heckscher v. Trotter*, N. J. Ct. Ch. Sept. 11, 1886; 5 Atl. Rep. 652.

23. INSURANCE COMPANY—*Charter—Powers—Policy.*—Under a power in its charter to insure "hay, grain, and other agricultural products in barns, stacks, or otherwise, against loss by storms or hurricanes," an insurance company may insure a growing crop. An insurance of "stocks. crops, and farming implements" embraces a growing crop. *Mutual, etc. Co. v. DeHaven*, S. C. Penn. May 3, 1886; 22 Rep. 407.

24. INSURANCE — *Evidence.* — Evidence to show knowledge on the part of an alleged agent of the insured of other insurance was rightly excluded where no agency had been shown to exist. The policy provided that if the insured should have or afterwards make another contract of insurance whether valid or not, it should be void. *Held*, that insurance procured by a mortgage on the interest of the insured, without the knowledge of the latter, in conformity with a mortgage clause, was not other insurance within the meaning of the policy. *Held*, that where after knowledge of such other insurance the company without dissent proceeds to adjust the loss, this is a waiver of the alleged forfeiture. *Carpenter v. Continental, etc. Co.* S. C. Mich. June 17, 1886; 15 Ins. Law Journal, 667.

25. INTOXICATING LIQUOR—*Search and Seizure—Criminal Practice*—On a complaint for search and seizure, if the evidence at the trial shows that the search and seizure were made in the night-time, the respondent should ask the court to instruct the jury as to the effect of such evidence. The State is not required to prove that the unlawful intent as to the particular liquor seized existed at the moment of seizure. It is sufficient if it existed at the time of making the complaint. *State v. McGowan*, S. C. Me. Aug. 5, 1886; 6 East. Rep. 626.

26. NEGLIGENCE—At a point where a railroad crosses a highway, travelers on either have a right to cross the other. A train has a preferential right of way over a person traveling on the highway, but is bound to give timely notice of its approach and to moderate its speed enough to allow the highway traveler to avoid collision. The duty of a vehicle or foot traveler on the highway to give precedence to the train is founded on the obligation of the train men to give due warning of the train's approach. A foot traveler crossing a railroad track, by a foot-path near a highway crossing, who stops at the track to look and listen for an approaching train, but cannot perceive one or signals of one, and begins to cross but is struck by a train approaching suddenly, and without warning, and who is otherwise in the exercise of due care, is not chargeable with negligence contributing to the collision. *Baltimore, etc. Co. v. Owings*, Md. Ct. App. June 23, 1886; 3 Cent. Rep. 847.

27. ———. *Children in Public Street.*—The driver of a horse car is required to manage his car with reference to all the risks that may reasonably be expected, including the risks arising from the heedlessness and indiscretion of children. The degree of care which the law requires of a child old enough to be intrusted alone in a dangerous place, or as the custodian of a younger child, is that which may reasonably be expected of children of his age, or which children of his age ordinarily exercise. *Collier v. South Boston, etc. Co.*, S. Jud. Ct. Mass., July 3, 1886; 6 East. Rep. 648.

28. NOTES—*Application of Payments—Principals*—A. and B. were jointly liable to C. upon a judgment note given by them, and all three agreed that the production of B.'s oil wells should be turned over to C. to pay the amount for which A. and B. were jointly liable. B. afterwards directed the yield of the wells to be applied to the payment of other debts due by him to C., and for other purposes, which was done accordingly. In an issue to determine whether or not the judgment note was paid by the yield of the wells. *Held*, that as A. and B. were both principals in the obligation, it was within the power of either of them (without the knowledge or consent of the other) to change the application of the proposed payment, and that the judgment note could not therefore be treated as paid. *Tait v. Hackett*, S. C. Penn. May 12, 1886; Weekly Notes of Cases, Vol. 18, p. 145.

29. PARTNERSHIP—*Attachment—General Assignment*—The individual interest of a co-partner in the co-partnership effects is attachable. The attachment may be made by seizure of the effects, and the attaching officer may remove them for safe-keeping. That the defendant co-partner has overdrawn his account with the co-partnership does not invalidate the attachment. But the execution and record by the defendant co-partner of a general assignment for the benefit of his creditors under Public Statutes, R. I. chapter 237, section 12, at once dissolves the attachment. *Trafford v. Hubbard*, S. C. R. I., June 11, 1886; 6 East. R., 693.

30. ———. *Equity—Injunction and Account—Obscure and Irregular Accounts*—A bill for account and provisional injunction to prevent interference with partnership assets will lie at the suit of one partner, notwithstanding the accounts of the partnership are irregular, and the evidence concerning them is obscure and conflicting. Stobig's Appeal, S. C. Penn. May 3, 1886; 5 Atl. Rep. 670.

31. PLEADINGS.—*Amendments — When Allowed—Striking Out.*—Where the filing of an amended pleading is necessary to enable a party to prove any cause of action or matter of defense in his case, it is error in the trial court to deny the application of such party to file such amended pleading at any time after the filing of a defective pleading, before or after trial. But otherwise where such amended pleading is not necessary to the admission of material testimony. Words in a pleading, other than the formal parts thereof, which are not necessary as the foundation of pertinent and proper testimony to prove the action or defense, or some part thereof, of the party filing such pleading, may be stricken out on motion at any time before the trial. Otherwise where such words are necessary as a foundation for such testimony. *Hale v. Wigton*, S. C. Neb., Sept. 8, 1886; 29 N. W. R., 177.

32. PRACTICE.—*Withdrawing Exceptions — Motion for New Trial.*—An agreement of parties, withdrawing a pending bill of exceptions and providing that judgment shall be rendered on the verdict, does not prevent the excepting party from availing himself of a motion for a new trial on the ground of newly-discovered evidence. *Emery v. Mayberry*, S. C. Maine, Aug. 5, 1886; 6 East. Rep., 625.

33. SALE.—*Pleading — Article or Machinery to be Satisfactory—Discretion of Purchaser.*—Where a purchaser of an article or machine is sued for the agreed price, it is a sufficient answer to the complaint that the thing to be delivered under the contract was to work satisfactorily to him, and that he refused to accept it, as he knew, upon investigation, that it would not work to his satisfaction. *Exhaust, etc. Co. v. Chicago, etc. Co.*, S. C. Wis., May 15, 1886; 22 Rep., 389.

34. TRADE-MARK.—Where marks, such as arbitrary combinations of figures, indicating style or quality also indicate origin, they may be a subject of trade-mark and their use as such protected. The sight of a familiar symbol inducing one to purchase goods to which the symbol does not properly belong, to the injury of him who devised it to mark his own goods, is the gravamen of the law of trade-marks. A complainant in a suit to restrain the use of a trade-mark cannot maintain an exclusive right to the use of certain numbers which had been used by a third person and become known to the trade as applied to the same styles of goods before complainant used them. *American, etc. Co. v. Anthony, etc. Co.*, S. J. C. Mass., July 3, 1886; 2 N. Eng. Rep., 630.

35. TRESPASS.—*Quare Clausum—Measure of Damages.*—In trespass *quare clausum* for felling the defendant's trees across the line fence, and covering the plaintiff's land with brush, the measure of damages is not confined to the expense of removing the brush, nor is it limited to the value of the land incumbered. *Hutchinson v. Parker*, S. C. of N. H., July 30, 1886; 5 Atl. Rep., 659.

36. VENDOR AND VENDEE.—*Vendor's Lien — How Created—How Waived—Vendor's Lien as Security for a Note—Title of Vendor.*—A vendor's lien is given by law when one person sells land to another on a credit, and may be waived by such facts as show that the seller relies on other security, or relinquishes his right to the security which the law gives him; but the absence of knowledge that the law gives such security, or a mere secret intention not to claim it, does not affect the right. To prove that a vendor's lien exists to secure the payment of a note, it must appear that the vendor has a valid title to the land. *Houston v. Dickson*, S. C. Texas, June 14, 1886; 1 S. W. Rep., 375.

37. WAREHOUSEMAN.—*Evidence.*—The implied undertaking of a warehouseman is, not that he will at all events keep the goods safely, but that he will use reasonable and ordinary care and diligence in keeping them. In an action brought to recover damages caused to goods while stored in a warehouse, the burden of proof is upon the plaintiff to show that the damage was caused by the negligence of the warehouseman. Cass v. B. & L. R. R. Co., criticised. *Willett v. Rich*, S. J. C. Mass., July 6, 1886; 6 East. Rep., 660.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

25. A., the owner of a newly erected building, leased the same to B. for one year. B., under arrangements with a gas company, had pipes laid connecting a portion of the building with the company's mains, and a gas meter put in; but also, without the knowledge or consent of either A. or the company, procured another pipe to be laid connecting other parts of the building with the company's main. During his term he used gas through all the pipes, but the pipe surreptitiously laid, passed the gas around the meter. At the end of the term A. entered into possession and consumed the gas in all parts of the building. This has continued for more than a year. At the end of each month the company has regularly presented its bill for gas consumed by A., according to the meter, and all were paid by A. Both parties being ignorant of the fact that any gas, not registered by the meter, had been consumed, no payment has been made therefor. But the company, having now learned the facts, sues A. in assumpsit. Queries: Is A. liable? Does the law imply a promise when neither party, at the time, knew that the company was furnishing or that A. was using the gas? What, in this action, is the effect of the monthly settlements? If the form of the action be inappropriate, what kind of suit would be proper? Please give authorities. B. L.

QUERIES ANSWERED.

Query 38. [22 Cent. L. J. 334.]—A., B., C., D., & E. employ a lawyer, G., to render certain professional services. After the work is done, G., the lawyer, asks A., B., C., & D. for their joint and several note in payment. This they refused to give. But he urges and tells them that he will procure E's signature, and in no event shall they, A., B., C. & D., be liable for more than a fifth (1-5) each, of the whole amount. They

pay the one-fifth each. E. never signs. In a suit by G., the lawyer, v. A., B., C. & D., for the other fifth, can they show the collateral agreement by oral evidence? I can find no cases exactly in point, the nearest being Miller v. Gambie, 4 Barb. 146; Ely v. Kilborn 5 Denio, 514; Ande v. Dixon, 6 Exch. 869. Please cite cases, or authorities. N. B. JONES.

Athens, Ga.

Answer.—The inference from the latter part of the query and the citations is, that the note was signed, though it is stated that the parties refused to sign, and that the suit is on the note. The case cited of Miller v. Gambie seems to sustain the proposition. It is there decided that if a party signs a note upon condition that another person shall also sign it, he is not liable on it as between the original parties unless the condition is complied with. It has been held in a number of cases that if the delivery was conditional, that is, if the written instrument was not to take effect till the happening of a certain event, such as the signing by another party, the suit thereon may be defeated by showing that such event has not happened, the agreement being by parol. But evidence of a parol agreement to avoid a written instrument by a subsequent event is not admissible. Goddard v. Cutts, 11 Maine, 440; 2 Phil. Ev. (Cowan, Hill & Edwards, notes), notes 495 and 502. This seems to be approved in the cited case of Ely v. Kilborn, 5 Denio, 514. The consideration in such cases may always be examined into, and this is held to involve an examination of all the facts and circumstances attending the transaction, so far as the point of consideration is concerned. Bernhard v. Brunner, 4 Bos. 528. The terms on which a check was received were allowed to be shown by a letter written by the holder four days before the note was made. Denniston v. Bacon, 10 Johns. 198. In a recent case in Pennsylvania it is stated, that the admissibility of such a defence is "so well settled as to preclude discussion." Walker v. France, 22 Rep. 213. S. S. M.

CORRESPONDENCE.

In the sub-joined communication, a correspondent criticises the answer of S. S. M. to Query No. 43, of Volume 22. The question, with the answer, appears on page 312 of the current volume. Our correspondent says:

"It seems to me that the answer of S. S. M. to Query 43 is not good. His statement of a general proposition of law is correct, but he fails to observe that the agreement to take a less sum than the face of the note, is based upon the ground of a partial failure or want of consideration. Here is an agreement as to the actual amount due, and not an agreement to take less than the amount due and owing." W. H. B.

Lawrenceburg, Ind.

To this S. S. M. replies as follows:

"A claimed one amount and C's father alleged that a less amount was due. A. agreed to take the less amount. It then became a case of accord and satisfaction, which is defined as the settlement of a dispute or the satisfaction of a claim by an executed agreement between the party injuring and the party injured. Bull v. Bull, 43 Conn. 455; 6 Wait's Act. & Def. 408. The money was to be paid to A. in a few days, which was not done. So the satisfaction was not made, and A. was not bound by the accord (see authorities cited in answer), and was relegated to his original rights on the note. We cannot see, from the case stated, that A. consented that he was not entitled to the face of the note; on the contrary, he only consented to the terms proposed to avoid a law suit. The case seems to fall under all the rules applicable to an accord satisfaction."

RECENT PUBLICATIONS.

TACT IN COURT.—Containing sketches of cases won by by skill, wit, art, tact, courage and eloquence. With practical illustrations in letter of lawyers giving their best rules for winning cases. Third Revised Edition. By J. W. Donovan, Authors of "Modern Jury Trials," Trial Practice," and Trial Lawyers." Rochester, N. Y. Williamson & Higbie Laws Booksellers and Publishers, 1886.

This little volume, now in its third edition, is well worthy of the favor it has met at the hands of the profession.

There are more than sixty separate articles each one replete with that practical wisdom, and peculiarly shrewd hard sense for which the author, as most of our readers know, is so remarkable. Each of these several essays teaches at least one, and often many more lessons in the practical conduct of professional life which can be learned nowhere else, except in the costly and disastrous school of actual personal experience. And those lessons are taught in such a manner that no one who takes up the book can fail to read it, and no one who reads it can fail to remember much that will be of great service to him throughout his professional career.

Mr. Donovan as might be supposed addresses himself chiefly to the young practitioner, but there are few men in the profession so old or so experienced that they cannot learn much from this unpretentious little volume.

The articles are, from the necessity of the case and the character of the subject matter unconnected with each other, but each is complete in itself and none fail to teach in apt language the lessons it was intended to inculcate. Mr. Donovan's style is good, his anecdotes, which are frequent, are well told, and pertinent to the subject under discussion.

"The cheerful sage when graver methods fail,
Conceals the moral in a pleasing tale."

JETSAM AND FLOTSAM.

HE KNEW THE LAW—A Scotch cobbler, described briefly as a "notorious offender," has passed his life in a certain "Auld Licht" village without being converted. Last week a Farfar magistrate sentenced him to a fine of half a crown or twenty-four hours' imprisonment. If he chose the latter he would be taken to the jail at Perth. The cobbler communed with himself. "Then I'll go to Perth," he said; "I have business in the town at any rate." An official conveyed him by train to Perth, but when the prisoner reached the jail, he said that he would now pay the fine. The governor found that he would have to take it. "And now," said the cobbler, "I want my fare home." The governor demurred, made inquiries, and discovered that there was no alternative; the prisoner must be sent at public expence to the place he had been brought from. So our canny cobbler got the two shillings and eight and one-half pence, which represented his fare, did his business, and went home triumphant—two and one-half pence and a railway ride better for his offence.